APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DAVID STONER, individually; UNITED STATES OF AMERICA, Ex Rel. John David Stoner,

Plaintiffs-Appellants,

and

THE STATE OF CALIFORNIA; COUNTY OF SANTA CLARA,

Plaintiffs,

v.

SANTA CLARA COUNTY OFFICE OF EDUCATION; EAST SIDE UNION HIGH SCHOOL DISTRICT; COLLEEN B. WILCOX; JOE FIMIANI; DAVID WONG,

Defendants-Appellees.

No. 04-15984

D.C. No. CV-03-04622-JW

OPINION

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted
May 17, 2007—San Francisco, California

Filed September 7, 2007

Before: Diarmuid F. O'Scannlain and Sandra S. Ikuta, Circuit Judges, and Leonard B. Sand,* Senior Judge.

Opinion by Judge Ikuta

COUNSEL

John David Stoner, Sunnyvale, California, for himself.

Peter D. Keisler, Assistant Attorney General; Kevin V. Ryan, United States Attorney; Douglas N. Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, Washington, D.C., as amicus curiae, by special leave of court.

Mark E. Davis and Marc J. Cardinal, Needham, Davis, Kirwan & Young LLP, San Jose, California, for the appellees.

OPINION

IKUTA, Circuit Judge:

Under the False Claims Act ("FCA"), "[a]ny person" who, among other things, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval" is liable to the Government for a civil penalty, treble damages, and costs. 31 U.S.C. § 3729(a)(1). The FCA authorizes a private person, known as a relator, to bring a *qui tam* civil action "for a violation of section 3729 for the

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* The Honorable Leonard B. Sand, Senior United States District Judge for the Southern District of New York, sitting by designation.

person and for the United States Government . . . in the name of the Government." 31 U.S.C. § 3730(b)(1). This case requires us to decide whether a *pro se* relator may bring a *qui tam* action in federal court on behalf of the government against various actors in the California school system.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant John David Stoner brought this *qui tam* action in the United States District Court for the Northern District of California against the Santa Clara County Office of Education ("SCCOE"), his former employer, the East Side Union High School District ("ESUHSD"), and three SCCOE employees, Colleen Wilcox, Joe Fimiani, and David Wong. In the proceedings before the district court, Stoner appeared *pro se*. Although Stoner is a licensed attorney, and has been admitted to practice before this court, *see* Fed. R. App. Proc. 46(a), he is not a member of the State Bar of California, and consequently could not be admitted to membership before the district court for the Northern District of California, *see* Northern District of California, Civil Local Rule 11-1. Stoner's complaint alleged that defendants presented various fraudulent claims for payment or approval to the United States in violation of the False Claims Act ("FCA"). Specifically, he claimed that defendants falsely certified compliance with the Individuals with Disabilities Education Act to induce the government to disburse more money for certain educational programs. Stoner's complaint also raised a number of

state law claims, including alleged violations of the California False Claims Act.

As required by the FCA, Stoner filed his complaint under seal and served it on the United States. *See* 31 U.S.C. § 3730(b)(2). After the United States declined to intervene, the complaint was unsealed and served on the SCCOE. The SCCOE immediately moved to dismiss the claims against it, arguing, among other things, that it was not a "person" subject to liability under the FCA. The remaining defendants joined in that motion.

The district court granted the motion to dismiss after determining that the complaint failed to state a claim under the FCA. *See* Fed. R. Civ. P. 12(b)(6). The court held that the FCA did not provide a cause of action against the SCCOE and the ESUHSD because each entity is a state agency, and thus not a "person" subject to liability under the FCA. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000) (holding that the FCA does not subject a state or state agency to liability in a *qui tam* action brought by a private relator). Relying on *United States ex rel. McVey v. Board of Regents of the University of California*, 165 F. Supp. 2d 1052, 1058-59 (N.D. Cal. 2001), the court also held that Stoner could not sue the individual SCCOE employees in their personal capacities under the FCA for actions committed in the course of their official responsibilities. In addition, the court *sua sponte* raised the issue of Stoner's authority to prosecute a *qui tam* action on behalf of the United States *in propria persona* and held that Stoner could not proceed

pro se[1] on the FCA claims. The court then declined to exercise supplemental jurisdiction over Stoner's remaining state law claims and dismissed Stoner's complaint in its entirety. Stoner filed this timely appeal. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 923 (9th Cir. 2001) (noting that a motion to dismiss becomes a final appealable order within the meaning of 28 U.S.C. § 1291 when the district court order disposes of all claims against all parties).[2]

STANDARDS OF REVIEW

"A dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo." *Marder*, 450 F.3d at 448. "All allegations of material fact in the complaint are taken as true and construed in the light most favorable to the plaintiff. Dismissal of the complaint is appropriate

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[1] The phrases *in propria persona* and *pro se* are synonymous. *See* Black's Law Dictionary 1256 (8th ed. 2004); *see also Savage v. Estelle*, 924 F.2d 1459, 1460 n.1 (9th Cir. 1990) ("no legal distinction" between the phrases in the context of self-representation).

[2] Prior to oral argument in this case, Stoner filed a request for judicial notice of certain documents not part of the record on this appeal. The defendants oppose Stoner's request on the grounds that the documents submitted are unauthenticated, lack foundation, and do not satisfy the requirements of Rule 201 of the Federal Rules of Evidence. Because the documents at issue do not fall within the narrow exception to the general rule that the scope of this court's review on a motion to dismiss for failure to state a claim is limited to the contents of the complaint, *see Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006), Stoner's request for judicial notice is denied.

only if it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief." *McGary v. City of Portland*, 386 F.3d 1259, 1261 (9th Cir. 2004) (internal citation omitted).

Questions of statutory interpretation and the existence of sovereign immunity are also reviewed de novo. *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1213 (9th Cir. 1996); *United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1144 (9th Cir. 2004).

DISCUSSION

I.

We first address the question whether school districts in California, including county offices of education, are subject to *qui tam* liability under the FCA. We begin our analysis with the language of the statute itself. The FCA subjects to liability any "person" who, among other things, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a). Section 3729 does not define the term "person." However, *Stevens* held that a state or state agency is not a "person" for purposes of § 3729 and, therefore, not subject to liability in *qui tam* suits brought by private parties. 529 U.S. at 787-88.

In light of *Stevens*' holding, we must determine whether the SCCOE, a California county office of education, and the ESUHSD, a California school district, are state agencies. Although we have not yet considered this issue in the context of the FCA, we previously determined that a California school dis-

trict and county office of education were state agencies for purposes of Eleventh Amendment sovereign immunity. *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 254 (9th Cir. 1992); *Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1996). The district court looked to these cases in ruling that neither the SCCOE nor the ESUHSD was a "person" within the meaning of 31 U.S.C. § 3279.

We agree with the district court's approach. As explained below, *Stevens* teaches that our Eleventh Amendment case law should guide our determination of whether an entity is a state agency and thus not a "person" for purposes of § 3279. *Stevens*' analysis of the word "person" in § 3279 was driven by canons of statutory construction relating to protection of the state's sovereign immunity. *See Stevens*, 529 U.S. at 781-87. Specifically, *Stevens* based its holding that neither a state nor a state agency were "persons" within the meaning of § 3279 on the following canons of statutory construction related to state sovereignty: (1) the presumption that the term "person" does not include the sovereign, *id.* at 780; (2) the rule that Congress must clearly state its intention to subject states to liability, *id.* at 781-82, 787; (3) the presumption against imposition of punitive damages on governmental entities, *id.* at 784-85; and (4) "the ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute," *id.* at 787. Applying these canons, the Court observed that "far from providing the requisite affirmative indications that the term 'person' included States for purposes of *qui tam* li-

ability," Congress expressed a contrary intent. *Id.* This conclusion was buttressed by "the doctrine that statutes should be construed so as to avoid difficult constitutional questions." *Id.* With respect to this last point, the Supreme Court explained that there was "'a serious doubt'" on the question whether an action in federal court by a *qui tam* relator against a state or a state agency would be consistent with the Eleventh Amendment, *id.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)), although the Court was careful to "express no view" on this issue. *Id.* In effect, the Court presumed that in enacting the FCA, Congress intended not to infringe on a state's sovereign immunity and therefore did not make states subject to suit under the FCA.

To effectuate Congress's presumed intent, we must interpret the term "person" under § 3279 in a way that avoids suits against "state instrumentalities" that are effectively arms of the state immune from suit under the Eleventh Amendment. *See also Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989) (instructing lower courts to refer to the Eleventh Amendment arm-of-the-state analysis in determining whether an entity is an agency of the state and thus not a "person" for purposes of 42 U.S.C. § 1983 (citing *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977))). Our conclusion that we must rely on our Eleventh Amendment jurisprudence to determine whether an entity is a "person" within the meaning of § 3279 is further underlined by our post-*Stevens* holding that "states and state agencies enjoy sovereign immunity from liability under the FCA." *Bly-Magee v. California*, 236 F.3d 1014, 1017 (9th

Cir. 2001); *see also United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1145 (9th Cir. 2004). Both *Bly-Magee* and *Ali* implicitly recognize that Eleventh Amendment principles guided the Supreme Court's decision in *Stevens*.

We thus look to our Eleventh Amendment case law in determining whether the SCCOE and the ESUHSD are state agencies not subject to FCA liability under *Stevens*. We have held that a California school district and county office of education are arms of the state for purposes of Eleventh Amendment sovereign immunity. *Belanger*, 963 F.2d at 254; *Eaglesmith*, 73 F.3d at 860. Accordingly, we must conclude that neither the SCCOE nor the ESUHSD is a "person" subject to liability under § 3279 of the FCA. *Stevens*, 529 U.S. at 781-87. By the same reasoning, Stoner's *qui tam* action against the SCCOE and the ESUHSD is barred by the Eleventh Amendment. *Ali*, 355 F.3d at 1145; *Bly-Magee*, 236 F.3d at 1017.

Stoner asks us to revisit *Belanger* and *Eaglesmith* in light of *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), which was decided by the Supreme Court five years after *Belanger*. He contends that after *Regents*, a state agency is not shielded by the state's sovereign immunity unless the state is directly liable for any money judgment rendered against the agency. We disagree. *Regents* holds that the Eleventh Amendment may bar a lawsuit against a state agency in circumstances where the state is legally liable for a judgment against that agency, even if the state is indemnified against that liability by a third party. *Id.* at 426. But nothing in *Regents* requires us to depart from the well-

established Eleventh Amendment principle that a governmental entity may be an arm of the state protected by sovereign immunity where the state is functionally liable, even if not legally liable, on money judgments against the state entity. *See, e.g.*, *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 50 (1994) ("Where an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the eleventh amendment require that sovereign immunity attach to the agency." (internal quotation marks omitted)); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979) (The Eleventh Amendment "protect[s] the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." (emphasis added)). In decisions issued after *Regents*, we held that California school districts and county offices of education are entitled to the state's Eleventh Amendment immunity, due in part to their statutorily mandated relationship with the state, which (among other things) makes the state treasury unconditionally liable to make up any budgetary shortfall encountered by either entity as a result of an adverse judgment. *See Beentjes v. Placer County Air Pollution Control Dist.*, 397 F.3d 775, 780-81 (9th Cir. 2005); *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1183 (9th Cir. 2003); *Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1042 (9th Cir. 2003); *Eason v. Clark County Sch. Dist.*, 303 F.3d 1137, 1142 (9th Cir. 2002). These cases make clear that *Belanger* and *Eaglesmith* remain binding authority of this circuit following *Regents*.

Following *Belanger* and *Eaglesmith*, therefore, we hold that the SCCOE and the ESUHSD are arms of the state, and therefore not "persons" subject to *qui tam* liability under the FCA. Stoner thus has no statutory authority to bring an FCA claim against the SCCOE and the ESUHSD. *See* 31 U.S.C. § 3729(a); *Stevens*, 529 U.S. at 787-88. By the same token, the Eleventh Amendment poses an independent bar to *qui tam* action against either entity. *Bly-Magee*, 236 F.3d at 1017. Accordingly, the district court properly dismissed Stoner's FCA claims against both entities.

II.

We next turn to the district court's dismissal of the FCA claims asserted against the three individual SCCOE employees named in Stoner's complaint. While Stoner's complaint does not specify the capacity in which he was suing Wilcox, Fimiani, and Wong, "[t]he course of proceedings" in this case indicates that Stoner was suing these employees in their individual, as well as official capacities. *See Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) ("In many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both. 'The course of proceedings' in such cases typically will indicate the nature of the liability sought to be imposed." (quoting *Brandon v. Holt*, 469 U.S. 464, 469 (1985))). With respect to the official capacity claims, the district court held that the individually named defendants could not be sued for damages in their official capacities because such a suit would, in effect, be against the state. *See Will*, 491 U.S. at 71 (concluding that a state official sued in his or her official capacity for money damages is

not a "person" subject to suit under 42 U.S.C. § 1983 because "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office," and for this reason "is no different from a suit against the State itself"). The parties do not challenge this ruling and we express no opinion on the merits of the district court's conclusion.

The district court also held that Stoner failed to state an FCA claim against the individual defendants in their personal capacities because Stoner could not allege that the defendants' actions exceeded the scope of their official responsibilities. As explained below, this was an error. The plain language of the FCA subjects to liability "any person" who, among other things, knowingly submits a false claim or causes such a claim to be submitted to the United States. 31 U.S.C. § 3729. Although the FCA does not define the term "person," the Supreme Court has made clear that the term includes "natural persons." *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125 (2003); *see also* 1 U.S.C. § 1 (defining the term "person" for purposes of "determining the meaning of any Act of Congress" as including an individual). Therefore, state employees sued in their personal capacities are "persons" who may be subject to liability for submitting a false claim to the United States. *Cf. Hafer v. Melo*, 502 U.S. 21, 27 (1991) (concluding, in context of case filed pursuant to 42 U.S.C. § 1983, that "[a] government official in the role of personal-capacity defendant . . . fits comfortably within the statutory term 'person'").

To state a claim against Wilcox, Fimiani, and Wong in their personal capacities, Stoner need show

only that the individual employees "knowingly present[ed], or caus[ed] to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). Stoner's complaint alleged that Wilcox, Fimiani, and Wong knowingly presented or caused to be presented false or fraudulent statements to the United States Department of Education to obtain federal funds for various educational programs. If true, these allegations are sufficient to state a claim for personal liability under 31 U.S.C. § 3729(a)(1). Stoner need not allege that the individual defendants personally profited from such false submissions. Nothing in § 3729(a)(1) requires the person knowingly making a false submission to obtain a personal benefit from the wrongful act.

In dismissing the FCA claims against Wilcox, Fimiani, and Wong, the district court relied on *McVey*, 165 F. Supp. 2d at 1058-59, which held that "[u]nder the FCA, a state official is immune from suit for actions taken in his position," even where it is alleged that the official abused his authority. *Id.* at 1059; *see also United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932, 937 (8th Cir. 2001) (holding that state official could not be sued under the FCA in his individual capacity unless he was acting "outside his official duties" when he took the action alleged to violate the FCA (quoting *Bly-Magee*, 236 F.3d at 1016)). We disagree with *McVey* and *Gaudineer* to the extent the reasoning of these cases cannot be reconciled with the plain language of the statute.

Our conclusion is supported by the Supreme Court's decision in *Hafer*, which rejected the argu-

ment that state officials may not be held personally liable under 42 U.S.C. § 1983 for actions taken in their official capacities. 502 U.S. at 27-31. The Court reasoned that to hold otherwise would, in effect, "absolutely immunize state officials from personal liability for acts within their authority and necessary to fulfilling governmental responsibilities." *Id.* at 28. The Court noted that such absolute immunity extends only to a very limited class of officials, "including the President of the United States, legislators carrying out their legislative functions, and judges carrying out their judicial functions." *Id.* at 29 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982)).

Hafer's reasoning is equally applicable to our interpretation of the FCA. The individual defendants named in Stoner's complaint do not fall into the narrow class of officials entitled to absolute immunity. Were we to interpret § 3729 to preclude an action against state officials in their personal capacities, our holding would be tantamount to a grant of absolute immunity under the FCA to state officials for any actions taken in the course of their governmental responsibilities. *See Hafer*, 502 at 27-29. Such an interpretation finds no support in the statutory language. It is also contrary to the principles of the Supreme Court's well-established public employee immunity jurisprudence. *Id.* at 29 (citing *Harlow*, 457 U.S. at 807); *see also United States ex rel. Burlbaw v. Regents of N.M. State Univ.*, 324 F. Supp. 2d 1209, 1215 (D.N.M. 2004). We decline to adopt an interpretation of § 3729 that is at odds with the statutory language and clear guidance from the Supreme Court. We therefore hold that state employ-

ees may be sued in their individual capacities under the FCA for actions taken in the course of their official duties.[3]

The individual defendants challenge this straightforward conclusion by contending that it permits an end-run around *Stevens* and the Eleventh Amendment. They argue that a relator precluded from asserting a *qui tam* action against a state agency could bring the same action against individual state employees in their personal capacity. We find this argument unpersuasive. An individual capacity suit for damages against state officials alleged to have personally violated § 3729 does not implicate the principles of state sovereignty protected by *Stevens* and our Eleventh Amendment jurisprudence because such an action seeks damages from the individual defendants rather than the state treasury. *See Alden v. Maine*, 527 U.S. 706, 757 (1999). Nor does the fact that a state may choose to indemnify the employees for any judgment rendered against them bring the Eleventh Amendment into play. *See Demery v. Kupperman*, 735 F.2d 1139, 1147-1148 (9th Cir. 1984) (state may not impart sovereign immunity, and thereby prevent vindication of federal rights in federal court, by adopting an indemnification policy). As the Supreme Court explained, "the distinction between-official capacity suits and per-

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[3] Of course, state employees sued under the FCA may be entitled to qualified immunity. Any personal immunity defenses that may be available to Wilcox, Fimiani, and Wong, including the defense of qualified immunity, are not before us in this stage of the proceedings where the defendants have not yet filed an answer.

sonal-capacity suits is more than 'a mere pleading device.'" *Hafer*, 502 U.S. at 27 (quoting *Will*, 491 U.S. at 71). Where a plaintiff seeks to hold individual employees personally liable for their knowing participation in the submission of false or fraudulent claims to the United States government, the state is not the real party in interest, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984), and the Eleventh Amendment poses no barrier to such a suit. *Hafer*, 502 U.S. at 30-31.

To summarize, we hold that state officials, sued for damages in their individual capacities, are "persons" within the meaning of 31 U.S.C. § 3729. The Eleventh Amendment does not bar such suits. Accordingly, the district court erred in holding that Stoner had failed to state a claim under § 3729 against Wilcox, Fimiani, and Wong, in their personal capacity.

III.

Finally, we must address the district court's determination that Stoner could not proceed *pro se* on this FCA action. As noted above, although Stoner is an attorney, he was not a member admitted to practice before the district court as a matter of the court's local rules. It has long been established that an individual wanting to prosecute or defend an action in federal court must be represented by a lawyer admitted to practice before that court, unless such individual is permitted to proceed *pro se* under 28 U.S.C. § 1654 or other federal law, *see C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697-98 (9th Cir. 1987), or is himself an attorney granted *pro hac vice* admission. Stoner did not secure *pro hac vice* admission, but sought to proceed *pro se*. The general *pro se*

provision set forth in 28 U.S.C. § 1654 provides that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . . ." While this provision allows Stoner to prosecute his own actions *in propria persona*, that right is personal to him, and absent some other statutory authorization, Stoner has no authority to prosecute an action in federal court on behalf of others than himself. *C.E. Pope Equity Trust*, 818 F.2d at 697.

However, this is exactly what Stoner seeks to do. Stoner has brought this action pursuant to 31 U.S.C. § 3730(b)(1), which provides that a "person," known as the relator, "may bring a civil action for a violation of section 3729 for the person *and for the United States Government* . . . in the name of the Government." 31 U.S.C. § 3730(b)(1) (emphasis added). As this court has explained, "the entire purpose of the FCA's *qui tam* provisions is to employ the help of individuals to uncover fraud against the government." *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993). To this end, the FCA motivates "a private individual [to] bring suit in federal court *on behalf of the United States*" by effecting a partial assignment of the government's damages claim to the relator. *Stevens*, 529 U.S. at 768 (emphasis added).

Although the partial assignment allows the relator asserting the government's injury to satisfy the requirements of Article III standing, it does not transform a *qui tam* action into the relator's "own case" for purposes of § 1654. The FCA makes clear that notwithstanding the relator's statutory right to the government's share of the recovery, the underly-

ing claim of fraud always belongs to the government. *See* 31 U.S.C. § 3730(c)(5) (providing that "the Government may elect to pursue *its claim* through any alternate remedy" (emphasis added)). Accordingly, where the government chooses not to intervene, a relator bringing a *qui tam* action for a violation of § 3729 is representing the interests of the government and prosecuting the action on its behalf. *See* 31 U.S.C. § 3730(b)(1); *see also United States v. Schimmels (In re Schimmels)*, 127 F.3d 875, 882 (9th Cir. 1997) ("[T]he United States is the real party in interest in any False Claims Act suit, even when it permits a *qui tam* relator to pursue the action on its behalf.'" (quoting *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 50 (4th Cir. 1992))); *Kelly*, 9 F.3d at 743 ("The express language of the FCA gives relators the right to bring suit *on behalf of the government*." (emphasis added)). Nor does the FCA "support a finding that the government and the relators can pursue their interests . . . separately," *Schimmels*, 127 F.3d at 884, such that relators could bring their "own case" without binding the government. Rather, the United States "is bound by the relator's actions" for purposes of res judicata and collateral estoppel. *Id.*; *see also United States ex rel. Rockefeller v. Westinghouse Elec. Co.*, 274 F. Supp. 2d 10, 16 (D.D.C. 2003); *United States ex rel. Schwartz v. TRW Inc.*, 118 F. Supp. 2d 991, 996 (C.D. Cal. 2000). Because *qui tam* relators are not prosecuting only their "own case" but also representing the United States and binding it to any adverse judgment the relators may obtain, we cannot interpret § 1654 as authorizing *qui tam* relators to proceed *pro se* in FCA actions.

Because the general *pro se* provision, 28 U.S.C. § 1654, does not authorize Stoner to proceed *pro se* on behalf of the government, Stoner must identify an alternate source of authority granting him this privilege. This Stoner has failed to do. The FCA itself does not authorize a relator to prosecute a § 3729 violation *pro se*. While the FCA gives a relator the "right to conduct the action," 31 U.S.C. § 3730(c)(3), Stoner can point to no language enabling a relator to conduct the action without a licensed attorney. Given the fact that Congress did not expressly authorize a *qui tam* relator to proceed *pro se* when acting on behalf of the United States, it "must have had in mind that such a suit would be carried on in accordance with the established procedure which requires that only one licensed to practice law may conduct proceedings in court for anyone other than himself." *United States v. Onan*, 190 F.2d 1, 6 (8th Cir. 1951).

The Supreme Court's recent decision in *Winkelman v. Parma City School District*, 127 S. Ct. 1994 (2007), does not suggest a contrary conclusion. *Winkelman* considered whether the parents of a child covered by the Individuals with Disabilities Education Act ("IDEA") could proceed *pro se* in federal court to enforce IDEA's guarantee of a free appropriate public education for their child. *Id.* at 2000-05. The central question in *Winkelman* was whether IDEA grants parents the same independent substantive right to a free appropriate public education as it does their child, and thus whether unrepresented parents would be proceeding on their own behalf or on behalf of their child in an action to enforce this right in federal court. *Id.* at 1998. After examining

IDEA's statutory scheme, the Court held that the parents could bring such an action *pro se* pursuant to 28 U.S.C. § 1654 because IDEA gives the parents their own "independent, enforceable" right to the substantive adequacy of their child's education. *Id.* at 2005.

While *Winkelman* reaffirms that *pro se* plaintiffs are entitled to enforce their own independent rights in federal court under § 1654, it has no direct application here because the FCA makes clear that a relator brings a *qui tam* suit on behalf of the government. Unlike IDEA, which allows parents to proceed on their own behalf to vindicate their substantive right to a free appropriate public education for their child, the substantive right underlying the FCA action is the government's right not to be defrauded. *See Stevens*, 529 U.S. at 771 (The relator "is suing to remedy an injury in fact suffered by the United States."). The relator's interest in the lawsuit is limited to certain procedural guarantees, in addition to the "bounty" the relator will receive for successfully assisting the government in vindicating the government's substantive rights. *See Stevens*, 529 U.S. at 772. Stoner's reliance on *Winkelman* in the context of the FCA is thus misguided.

Our conclusion that a *pro se* relator cannot prosecute a *qui tam* action on behalf of the United States is consistent with the decisions of other circuits to have addressed the issue. *See United States ex rel. Lu v. Ou*, 368 F.3d 773, 775-76 (7th Cir. 2004); *see also Safir v. Blackwell*, 579 F.2d 742, 745 n.4 (2d Cir. 1974); *United States v. Onan*, 190 F.2d 1, 6 (8th Cir. 1951).

In an effort to distinguish these cases, Stoner argues that he is not truly proceeding *pro se* because the FCA grants the government a degree of oversight over the action, *see* 31 U.S.C. § 3730(c)(3). We are not persuaded. Unless it intervenes or moves to dismiss, the United States has little control over the conduct of the action. *See generally* 31 U.S.C. § 3730. For purposes of 28 U.S.C. § 1654, an unrepresented relator is not transformed into a relator represented by counsel merely because the government has some oversight of the case. The strong policy considerations underlying the general rule that parties may not represent the interests of others in federal court support our conclusion that the government's minimal oversight does not overcome Stoner's *pro se* status. In cases as complicated as *qui tam* actions, a licensed attorney is best equipped to present the complex legal and factual issues involved and "[a] federal court rightly expects a lawyer to represent a litigant." *C.E. Pope Equity Trust*, 818 F.2d at 697.

We therefore agree with the district court that Stoner is not entitled to proceed *pro se* in his action. In the dismissal order from which this case arises, the district court ruled that Stoner would be given a period of time in which to secure counsel if this action otherwise survived the defendants' motion to dismiss. Because we conclude that Stoner has stated a claim under the FCA against the individual defendants, we remand this case to the district court with instruction to give Stoner reasonable time to find counsel or, in the alternative, obtain *pro hac vice* admission. If Stoner fails to retain counsel or obtain *pro hac vice* admission, the district court should dis-

miss this action, without prejudice to the government.

IV.

For the reasons discussed above, we reverse the district court's ruling dismissing the FCA claims against the individual defendants named in Stoner's complaint.[4] We otherwise affirm the rulings of the district court. We remand this case for further proceedings consistent with this opinion. Each party shall bear its own costs on appeal. *See* Fed. R. App. P. 39(a)(4).

AFFIRMED in part; **REVERSED** in part; **REMANDED**.

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[4] The defendants also contend that Stoner's complaint fails to allege an actionable false certification upon which federal funding was conditioned. *See United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996) ("Violations of laws, rules, or regulations alone do not create a cause of action under the FCA. It is the false certification of compliance which creates liability when certification is a prerequisite to obtaining a government benefit."). The district court did not address this argument and we decline to resolve it here without giving the district court the opportunity to do so in the first instance. *See Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998) ("Generally, we do not consider an issue not passed upon below." (internal quotation marks omitted)).

APPENDIX B

FILED
2004 MAR -8 P 3:53
RICHARD W. WIEKING
CLERK
U.S. DISTRICT COURT
NO. DIST. OF CA.S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The United States of America et al., Ex Rel. John David Stoner,

Plaintiff(s),

v.

Santa Clara County Office of Education et al.,

Defendant(s).

NO. C 03-4622 JW

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND FOR LACK OF SUBJECT MATTER JURISDICTION

Docket No. 11

I. INTRODUCTION

This is a *qui tam* action. Plaintiff John Stoner, *in pro per*, filed this action on behalf of himself, the

United States, and the State of California (collectively "Stoner") against the Santa Clara County Office of Education ("SCCOE"), the East Side Union High School District ("ESUHSD") and three SCCOE employees. Stoner alleges violations of the Federal and California False Claims Acts and asserts other related state claims. Defendant SCCOE has moved to dismiss all of Stoner's claims for failure to state a claim, lack of subject matter jurisdiction, and lack of supplemental jurisdiction. Based upon the papers filed to date and the argument of counsel, the SCCOE's motion is GRANTED.

II. BACKGROUND

Stoner worked as a teacher at the SCCOE's Foothill Pilot Program from December 21, 2001 through June 30, 2003. In 2003, Stoner was not re-elected to his position and his employment was terminated on June 30. During his employment with the SCCOE, Stoner alleges that all defendants were involved in submitting false claims to the United States and the State of California in order to obtain funding for certain education programs. Stoner apparently complained about these activities to his employer, but nothing was resolved and he was eventually terminated.

On October 17, 2003, Stoner filed this action against defendants alleging eleven claims for relief. Stoner's first three claims are made on behalf of himself and the United States under the False Claims Act ("FCA"). Stoner's fourth, fifth, and sixth claims are made on behalf of himself and the State of California under the California False Claims Act ("CFCA"). His seventh claim for relief is made solely on behalf of himself under the CFCA's whistleblower

provision. The remainder of Stoner's eleven claims involve contract and employment related claims against the SCCOE and its employees.

After filing this action, Stoner contacted the U.S. Attorney General, the California Attorney General, and the Santa Clara County Counsel regarding participation in this dispute. All government offices declined to intervene. Stoner was permitted to proceed *qui tam* on behalf of the United States and California against the defendants.

The SCCOE was the only defendant served at the time its motion was filed. Recently, the SCCOE's counsel accepted service for the remaining defendants the ESUHSD and SCCOE employees Colleen Wilcox, Joe Fimiani, and David Wong. Presently before the Court is the SCCOE's motion to dismiss Stoner's first seven FCA/CFCA claims either for failure to state claim or for lack of subject matter jurisdiction. In addition, the SCCOE has moved to dismiss the remainder of Stoner's state claims for lack of supplemental jurisdiction if the Court first dismisses all the federal claims. Since all defendants are now commonly represented and SCCOE's motion to dismiss equally applies to the other defendants, the Court will include the other defendants in its ruling on SCCOE's motion to dismiss.

III. STANDARDS

A. Federal Rule of Civil Procedure 12(b)(1)

Rule 12(b)(1) allows a party to challenge a federal court's jurisdiction over the subject matter of the complaint. A complaint will be dismissed if, looking at the complaint as a whole, it appears to lack federal jurisdiction either facially or factually. *See*

Thornhill Publ'g Co., Inc. v. General Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979). In considering a motion to dismiss for lack of subject matter jurisdiction, the court must accept all of plaintiff's factual allegations as true. *See Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1997).

B. Federal Rule of Civil Procedure 12(b)(6)

In ruling on a motion to dismiss, the court must accept as true all allegations of material fact and must construe said allegations in the light most favorable to the non-moving party. *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985). Any existing ambiguities must be resolved in favor of the pleading. *Walling v. Beverly Enterprises*, 476 F.2d 393, 396 (9th Cir. 1973).

A complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts stated under a cognizable theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984). In order to grant a motion to dismiss, it must appear to a certainty that a plaintiff would not be entitled to relief under any set of facts which could be proved. *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987).

IV. DISCUSSION

Under the FCA, "any person" who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval," is liable to the Government for a civil penalty, treble damages, and costs. 31 U.S.C. § 3729(a)(1). Although the Attorney General may sue under the FCA, a private person, known as a relator, may also

bring a *qui tam* action "in the name of the Government." *Id.* at § 3730(b). The relator must inform the Justice Department of his intentions and keep the pleadings under seal while the Government decides whether to intervene and do its own litigating. *Id.* at § 3730(b)(2). If the claim succeeds, the relator's share may be up to 3[illegible] percent of the proceeds of the action, plus reasonable expenses, costs, and attorney's fees. *Id.* at § 3730(d).

The CFCA, Cal. Gov. Code § 12650 *et*[] *seq*[.], was enacted in 1987 and is patterned largely on its federal counterpart the FCA. *American Contract Services v. Allied Mold & Die, Inc.*, 94 Cal. App. 4th 854, 858 (2001). The Act is designed to supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities by authorizing private parties, referred to as *qui tams* or relators, to bring suit on behalf of the State of California. *Id.* The ultimate purpose of the Act is to protect the public fisc. *Id.* As such, the Act must be construed broadly so as to give the widest possible coverage and effect to its prohibitions and remedies. *LeVine v. Weis*, 90 Cal. App. 4th 201, 210 (2001). Under the CFCA, a party who knowingly presents a false claim to a public entity to induce it to pay is liable for treble the damages sustained by the entity, plus costs, attorney fees and a maximum fine of $10,000 for each false claim. Cal. Gov. Code § 1265(a)(1)-(2). Damages may also be assessed against any party who benefits from the inadvertent submission of a false claim if the party, after learning of the claim's falsity, fails to disclose it to the public entity within a reasonable time. *Id.* at § 12651(a)(8). The relator must inform the Attorney

General of his intentions and keep the pleadings under seal while the Government decides whether to intervene and do its own litigating. *Id.* at § 12651(c)(2)-(4). If the claim succeeds, the relator's share may be up to 50 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. *Id.* at § 12652(g)(3).

Relator Stone's first three claims seek relief under the FCA, and his fourth, fifth, sixth, and seventh claims seek relief under the CFCA. The SCCOE has moved to dismiss these seven claims under Rule 12(b)(6) on the grounds that: (1) the SCCOE is not a proper party under either the FCA or the CFCA, and (2) Stoner failed to exhaust all his administrative remedies under Cal. Gov. Code § 12654(d)(4). In addition, the SCCOE has moved to dismiss Stoner's entire complaint for lack of subject matter jurisdiction, under Rule 12(b)(1), on the grounds that: (1) the SCCOE is immune from suit under either the FCA or the CFCA pursuant to the Eleventh Amendment to the U.S. Constitution, and (2) this Court lacks supplemental jurisdiction over Stoner's remaining state claims The Court addresses SCCOE's arguments below and, *sua sponte*, raises the issue of whether Stoner can represent the United States in this action *in pro per*.

A. Only one who his [sic] licensed to practice law can represent the United States in a *qui tam action*.

The Court, *sua sponte*, first raises the issue of whether Stoner, proceeding *in pro per*, can represent the United States in a *qui tam* action. The Court finds that he cannot. It is axiomatic that a non-

lawyer may not represent any person or entity other than himself. *Rowland v. California Men's Colony*, 506 U.S. 194, 201-03 (1993) (listing cases holding that non-lawyers may not represent partnerships or corporations in federal court); *Johns v. County of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997) ("[a] guardian or parent cannot bring suit on behalf of a minor in federal court without retaining a lawyer"); *In re America West Airlines*, 40 F.3d 1058, 1059 (9th Cir. 1994) (per curiam) (holding that a non-attorney may not appear on behalf of a partnership); *United States v. High Country Broadcasting Co.*, 3 F.3d 1244, 1245 (9th Cir. 1993) (per curiam) (non-lawyer sole shareholder may not represent corporation and was properly precluded from intervening and representing himself where his "interests [were] identical to the corporation's"); *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 698 (9th Cir. 1987) (non-lawyer trustee may not appear for trust); Phillips v. Tobin, 548 F.2d 408, 413-15 (2d Cir. 1976) (pro se litigant may not bring shareholders' derivative action). As the Eighty Circuit Court of Appeals has noted,

> we do not think that Congress could have intended to authorize a layman to carry on [a *qui tam* action under the False Claims Act] as attorney for the United States but must have had in mind that such a suit would be carried on in accordance with the established procedure which requires that only one licensed to practice law may conduct proceedings in court for anyone other than himself.

United States v. Onan, 190 F.2d 1, 6 (8th Cir.), *cert. denied*, 342 U.S. 869, 96 L. Ed. 654, 72 S. Ct. 112 (1951). At the March 1, 2004 hearing on SCCOE's

motion to dismiss, Stoner admitted that while he is a retired member of one or more state bars, his current inactive status does not allow him to practice law. He is simply not licensed to represent the United States in this action.

In general, the Court would not immediately dismiss a *qui tam* action that is brought *in pro per*. *See Safir v. Blackwell*, 579 F.2d 742, 745 n.4 (2d Cir. 1978) (suggesting that, where a non-lawyer seeks to prosecute a *qui tam* suit *in pro per*, the correct remedy would be to direct that the action be dismissed "unless an attorney is retained."). Stoner would normally be given a set time period to secure counsel, but the Court is persuaded that other grounds warrant the dismissal of Stoner's federal claims. The Court addresses these grounds in turn.

B. Stoner's FCA claims against the SCCOE and the ESUHSD are dismissed for failure to state a claim because they are state agencies and not "persons" subject to suit under the FCA.

The FCA subjects liability to "any person," who among other things, "knowingly presents or causes to be presented, to an officer or employee of the Unites [sic] States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a). The SCCOE argues that it and the ESUHSD, being state agencies, are not suable "persons" within the meaning of the FCA. In support of its argument, the SCCOE relies heavily on the U.S. Supreme Court's opinion in *Vermont Agency of Natural Resources v. United State* [sic] *ex rel. Stevens*, 529 U.S. 765, 120 S. Ct. 1858 (2000). In *Vermont*, the Supreme Court

held that states and state agencies are not "persons" subject to *qui tam* actions under the FCA. 529 U.S. at 787-788.

While it is true that states and state agencies cannot be subject to suit under the FCA, *Vermont* did not address whether the same holds for local government entities. The Supreme Court recently held that local government entities, e.g., municipalities, are subject to suit under the FCA. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 122 (2003). The key issue, therefore, is whether the SCCOE and ESUHSD are state agencies or a [sic] local government entities.

In determining whether a government entity is a state agency, at least for Eleventh Amendment purposes, the Ninth Circuit uses a five-factor test: (1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued in its own name; (4) whether the entity has the authority to hold property in its own name; and (5) whether the entity has the corporate status of a state agency. *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1988); *Belanger v. Madera Unified School Dist.*, 963 F.2d 248, 250-51 (9th Cir. 1992); *see also Regents of the Univ. of Cal*, 519 U.S. at 429 n.5 (whether an entity is an arm of the state "can be answered only after considering the provisions of state law that define the agency's character"). These five factors are well known as the *Mitchell* factors. *Belanger*, 963 F.2d at 251. The Ninth Circuit has found using the *Mithchell* [sic] factors that California school districts and offices of education are state agencies. *See Belanger*,

963 F.2d at 250-51 (involving a Section 1983 claim against a California school district); *J.C. Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1996) (involving a Section 1983 claim against a California office of education). This Court finds it proper to use the *Mitchell* factors to determine whether the SCCOE and ESUHSD are "persons," i.e., whether they are state agencies or local government entities, within the meaning of the FCA. *See Vermont*, 529 U.S. at 779 (holding that the question of whether the [FCA] itself permits a cause of action is "logically antecedent to the existence of" the Eleventh Amendment question).

In *Eaglesmith*, the Ninth Circuit applied the *Mitchell* factors in determining that the Mendocino County Office of Education ("MCOE") was a California state agency for the purposes of the Eleventh Amendment:

> Although the MCOE, like a California school district, may sue and be sued and may hold property in its own name, militating against a finding that it is a state agency, these two factors are not entitled to as much weight as the other three. Here, as in Belanger, a money judgment would be satisfied out of state funds. In addition, public school education is a central government function and the MCOE is an intergral [sic] part of that function. Finally, the fifth factor, corporate status of state agents, offers no basis for distinguishing Belanger from this case. The MCOE, like the school district in Belanger, has the corporate status of an agent of the state for the operation of the school system.

73 F.3d at 860 (citations omitted). In reaching its decision, the court relied heavily on its decision in *Belanger* where it held that the first factor, the source of funds to be awarded, is the most crucial consideration. *Belanger*, 963 F.2d at 251 ("The most 'crucial question . . . is whether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury.'") (citations omitted). Essentially, if a money judgment against a school district were to be satisfied out of state funds instead of local funds, e.g., property tax revenues, then the first *Mitchell* factor should weigh in favor of classifying a school district as a state agency. In *Belanger*, the Ninth Circuit found that the structure of California's centralized school funding system causes state and local revenue to be commingled into a single fund under state control. *Id.* at 251-252. As such, a money judgment against the SCCOE or ESUHSD would be paid from state funds because it is undisputed that their funding is controlled by California's school funding system. But Stoner argues that a monetary judgment against the SCCOE may be paid out of local funds instead of state funds because the SCCOE keeps records of which funds are which. The plaintiff in *Belanger* made this identical argument, and the court responded that "in light of California's centralized school funding system, this argument is irrelevant." The court explained:

> Under the [California] revenue limit system, state and local revenue is commingled in a single fund under state control, and local tax revenue lost to a judgment must be supplanted by the interchangeable state funds already in the district

budget. Any local funds withdrawn from the budget to pay a judgment are unavailable for education purposes, and state funds in the budget must cover any critical educational expenses that the local funds would have covered absent the judgment. This effectively draws state funds away from other programs in the budget to pay the judgment. In essence, any use of the commingled funds is a use of state funds. See Mitchell, 861 F.2d at 201 (stressing that "the district's budget is made up of funds received from the state's general fund pursuant to a state calculated formula").

Moreover, the local character of property tax revenue is lost when it is commingled with state funds under a state controlled revenue limit. As the district court noted, "If the entitlement from the property tax decreases, the amount of the revenue limit entitlement funded by the state increases, and vice-versa." Under the centralized revenue limit system, the allocation of property tax revenue is hopelessly intertwined with the allocation of state funds, and any change in the allocation of property tax revenue has a direct effect on the allocation of state funds.

Finally, because the state has complete control over the amount of property tax revenue that the district receives, and because this revenue is simply credited toward the revenue limit payment from the state fund, the property tax revenue is no more local than state income taxes generated from the same area. The state has assumed the burden of funding public schools, and property tax revenue allocated to the public school revenue

> limit program is state money collected for a state purpose.
>
> In summary, the bulk of the school district's budget comes directly from the state school fund, and the property tax revenue in the budget is interchangeable with the state funds and is treated as state funds for all practical purposes. Under California's revenue limit system, a judgment against the school district would be satisfied from state funds.

Belanger, 963 F.2d at 252.

The SCCOE and ESUHSD must manage their funds in accordance with Califonia [sic] law, and under California's revenue limit system, a judgment against either of these entities would be satisfied from state funds. *See id.* Accordingly, this Court comes to the same conclusion as did the Ninth Circuit in *Eaglesmith* and *Belanger*: the SCCOE and ESUHSD have the corporate status of an agent of the state for the operation of their school system. Therefore the SCCOE and ESUHSD, being state agencies, are not "persons" subject to *qui tam* actions under the FCA. *Vermont*, 529 U.S. at 787-788.

Stoner argues that cases like *Eaglesmith* and *Belanger* are distinguishable because they involve actions by private citizens under 42 U.S.C. § 1983 and not *qui tam* actions under the FCA. Stoner contends that while a Section 1983 action may result in a monetary judgment payable to a private citizen, a judgment under the FCA will be paid to the U.S. because such an action is brought on behalf of the U.S. This Court is not convinced. First, Stoner fails to cite any case law for this proposition. In addition,

out of an FCA monetary award, the relator's share may be up to 30 percent of the proceeds of the action, plus reasonable expenses, costs, and attorney's fees. 31 U.S.C. § 3730(d). If Stoner succeeded in a monetary award, it is clear that these funds would be paid from the State of California to Stoner, and such liability is impermissible under the Ninth Circuit's reasoning in *Belanger*. 963 F.2d at 251-52 ("The most 'crucial question . . . is whether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury.'") (citations omitted).

Because the SCCOE and ESUHSD are not "persons" subject to liability in a *qui tam* FCA action, the Court need not decide if these entities are immune from suit under the Eleventh Amendment. For the reasons stated above, Stoner's first three FCA claims against the SCCOE and ESUHSD are dismissed for failure to state a claim. *See Wool*, 818 F.2d at 1439 (dismissal is proper if it appears to a certainty that a plaintiff would not be entitled to relief under any set of facts which could be proved.).

B. Stoner's FCA claims against the remaining employee defendants are also dismissed for failure to state a claim because they are being sued in their official capacities.

Stoner also asserts his three FCA claims against three SCCOE employees. As discussed above, the FCA "does not subject a State (or state agency) to liability in such actions." *Vermont*, 529 U.S. at 787-88. And if the SCCOE employees are being sued in their official capacities, then the FCA claims against them must be dismissed because an action against a state

official in his official capacity "is not a suit against the official but rather is a suit against the State itself." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989); *United States ex rel. McVey v. Bd. of Regents*, 165 F. Supp. 2d 1052, 1058 (N.D. Cal. 2001). In an effort to save his claims, Stoner attempts to characterize his FCA claims against the SCCOE employees as claims against them in their individual capacities. The Court is not convinced. The Court has reviewed the pleadings and finds Stoner offers no evidence that the employee defendants were acting outside their official capacities during the incidents in question. At oral argument, Stoner argued that the employee defendants stepped outside their official capacities because they abused their authorities. The Court concludes that such allegations do not suffice. *See McVey*, 165 F. Supp. 2d at 1059 (holding that abuse of authority allegations would not suffice to sustain an FCA claim against a state official in his individual capacity). As such, Stoner's FCA claims against the three SCCOE employees are dismissed for failure to state a claim. *See Wool*, 818 F.2d at 1439 (dismissal is proper if it appears to a certainty that a plaintiff would not be entitled to relief under any set of facts which could be proved.). Since all FCA claims have been dismissed against all defendants, only state claims remain in Stoner's complaint.

C. This Court chooses not to exercise supplemental jurisdiction over Stoner's remaining state claims.

A district court may decline to exercise supplemental jurisdiction over a state claim if the court has dismissed all claims over which it has original juris-

diction. 28 U.S.C. 1367(c). The Court has dismissed all federal claims in this action. Stoner's remaining claims involve state questions under the California False Claims Act as well as California contract and employment law. This Court declines to rule whether Stoner may maintain CFCA claims against a state agency, and, in its discretion, declines to exercise supplemental jurisdiction over Stoner's remaining state claims. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (When all federal-law claims are eliminated before trial, "the balance of factors to be considered under the pendent jurisdiction doctrine -- judicial economy, convenience, fairness, and comity -- will point toward declining to exercise jurisdiction over the remaining state-law claims."). As such, Stoner's remaining state claims are dismissed for lack of subject matter jurisdiction.

V. CONCLUSION

For the reasons stated above, the SCCOE's motion to dismiss is GRANTED as to all defendants. Stoner's first, second, and third claims for relief are dismissed for failure to state a claim pursuant to Rule 12(b)(6). Stoner's remaining state claims are dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). Finally, this Court holds that only a licensed attorney, properly admitted to the presiding court, may bring a *qui tam* action on behalf of the United States. All future Court dates in this action are vacated.

Dated: March 8, 2004

s/
JAMES WARE
United States District Judge

APPENDIX C

FILED
NOV 23 2007
CATHY A. CATTERSON
CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DAVID STONER, individually; et al.,

Plaintiffs-Appellant,

And

THE STATE OF CALIFORNIA; et al.,

Plaintiffs,

v.

SANTA CLARA COUNTY OFFICE OF EDUCATION, et al.,

Defendants-Appellees.

No. 04-15984

D.C. No. CV-03-04622-JW

Northern District of California, San Jose

ORDER

Before: O'SCANNLAIN AND IKUTA, Circuit Judges, and SAND,* Senior Judge.

* The Honorable Leonard B. Sand, Senior United States District Judge for the Southern District of New York, sitting by designation.

The panel has voted to deny Appellees' Petition for Rehearing. Judges O'Scannlain and Ikuta have voted to deny Appellees' Petition for Rehearing En Banc, and Judge Sand recommends denying the en banc petition.

The full court has been advised of the Petition for Rehearing En Banc and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Rehearing and Petition for Rehearing En Banc are DENIED.

APPENDIX D

1. The Eleventh Amendment to the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. Section 3729 of Title 31, United States Code, provides in pertinent part:

False claims

(a) LIABILITY FOR CERTAIN ACTS.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

* * * * *

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .

* * * * *

4. Section 3730 of Title 31, United States Code, provides in pertinent part:

Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney

General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)

(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the

same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.

* * * * *

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable

attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

* * * * *

5. Section 1983 of Title 42, United States Code, provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

6. The Act of March 2, 1863, ch. 67, 12 Stat. 696, provides in relevant part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war, who shall make or cause to be made, or present or cause to be presented for payment or approval to or

by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent . . . shall be deemed guilty of a criminal offence, and shall be subject to the rules and regulations made for the government of the military and naval forces of the United States . . . .

* * * * *

SEC. 3. *And be it further enacted*, That any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the foregoing provisions of this act, he shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit, and every such person shall in addition thereto, on conviction in any court of competent jurisdiction, be punished by imprisonment not less than one, nor more than five years, or by fine of not less than one thousand dollars, and not more than five thousand dollars.

* * * * *

SEC. 4. *And be it further enacted*, That the several district courts of the United States, the circuit court of the District of Columbia, or any court therein to be established having general jurisdiction in civil cases, the several district courts of the Territories of the

United States within whose jurisdictional limits the persons doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States. . . .

* * * * *

SEC. 6. *And be it further enacted*, That the person bringing said suit and prosecuting it to final judgment shall be entitled to receive one half the amount of such forfeiture, as well as one half the amount of the damages he shall recover and collect . . . .

* * * * *

SEC. 8. *And be it further enacted*, That no officer or agent of any banking or other commercial corporation, and no member of any mercantile or trading firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation or firm; and every such . . . officer, agent, or member, or person, so interested, who shall so act, shall, upon conviction thereof, be punished by a fine of not more than two thousand dollars nor less than five hundred dollars, and by imprisonment for a term not exceeding two years.

* * * * *

7. The Act of April 20, 1871, ch. 22, 17 Stat. 13, provides in relevant part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

THE UNITED STATES OF AMERICA, EX[] REL[.] JOHN DAVID STONER; JOHN DAVID STONER, QUI TAM PLAINTIFF FOR THE STATE OF CALIFORNIA AND SANTA CLARA COUNTY; AND JOHN DAVID STONER, INDIVIDUALLY

Plaintiffs,

v.

CASE NO. C03-4622

SANTA CLARA COUNTY OFFICE OF EDUCATION, EAST SIDE UNION HIGH SCHOOL DISTRICT, COLLEEN B. WILCOX, PH.D., JOE FIMIANI, AND DAVID WONG

Defendants.

COMPLAINT
DEMAND FOR JURY TRIAL

1. John David Stoner, a private person, brings this action in the name of the Government of the United States for a violation of the False Claims Act, 31 U.S.C. § 3729 et seq. as amended, under the authority of § 3730(b) of that act.

2. John David Stoner, a "person" under the definition of that word in California Government Code § 12650(b)(5), also brings this action on behalf of

himself and the State of California and Santa Clara County for the violation of the California False Claims Act, Government Code § 12650 et. seq., as amended, particularly § 12652(c).

3. John David Stoner also brings this action on his own behalf against the Santa Clara County Office of Education, Colleen Wilcox, Joe Fimiani and David Wong (County Defendants):

a. Under the California Whistle Blower Protection Act, California Government Code, §§ 12650, et seq., The California Whistleblower Protection Act, Government Code §§ 9149.20 et seq., and the California False Claims Act, Government Code §§12650, et seq. as amended, particularly § 12653 (c) and (d).

b. For breach of an employment contract, fraudulent misrepresentations, termination of an employment contract contrary to public policy, terminating an intern employment without permitting the intern employee to complete his internship and in violation of the rights of a probationary employee to receive notice, reasons and a right to appeal.

I[.] JURISDICTION

4. Jurisdiction is conferred upon this court with respect to paragraph 1 above, by 31 U.S.C. § 3732 (a) as amended, by 28 U.S.C. §§ 1331 and 1345, by 20 U.S.C. § 1403 and by its general equitable jurisdiction.

5. Jurisdiction is conferred upon this court with respect to paragraph 2 above, by 31 U.S.C. §[]3732(b) since the claims under the State Law arise from the

same transactions and occurrences on which the claims in paragraph 1 are based.

6. Paragraph 3 is within the jurisdiction of this court conferred by 31 U.S.C. §[]3732(b), since the claims under the State Law arise from the same transactions and occurrences on which the claims in paragraph 1 are based, and is also within the ancillary jurisdiction of this Court since the facts related to these claims are also included in the facts on which the actions in paragraph 1 and 2 are based.

7. This Court has personal jurisdiction over Defendants because they conduct business, are located and reside in the Northern District of California[.]

II[.] INTRADISTRICT ASSIGNMENT

8. Venue is proper in this Court under 28 U.S.C. § 3732(a) and Federal Civil Local Rule 3-2(c) because a substantial part of the events or omissions which give rise to the claims occurred in Santa Clara County, which is in this Division and District.

III[.] PARTIES

9. The plaintiff with respect to the first paragraph is the United States of America. This action is brought on behalf of the United States Department of Education. At all times material to this action, the Department of Education was an agency and instrumentality of the United States and its activities, operations and contractual obligations were paid, at least in part, from federal funds. Federal funds went directly, or indirectly through the State of California, to both the Santa Clara County Office of Education (SCCOE) and the East Side Union High School District (ESUHSD) for the purposes of educating stu-

dents with special needs. Additional federal funds went directly or indirectly through the State of California to SCCOE in conjunction with the Intern program in which the qui tam plaintiff, John David Stoner, participated.

10. The plaintiffs with respect to the second paragraph of the Complaint are the State of California and Santa Clara County. At all times material to this action, the California Department of Education was an agency and instrumentality of the State of California and its activities, operations and contractual obligations were paid from state, county and federal funds. State funds went to both SCCOE and ESUHSD for the purposes of educating students with special needs. Additional state funds went to SCCOE in conjunction with the Intern program in which the qui tam plaintiff, John David Stoner, participated[.]

11. At all times material to this action, Santa Clara County, which is a political subdivision of the State of California, collected local property taxes, part of which were paid to both SCCOE and ESUHSD for the purposes of educating students with special needs and by SCCOE in the intern program in which the qui tam plaintiff participated.

12. The qui tam plaintiff, John David Stoner, during the period December 21, 2001 through June 30, 2003 was an employee of the Santa Clara County Office of Education (SCCOE) serving under contracts which provided that he would serve as an intern employee as a "Teacher of Students with Severe Disabilities, Foothill Pilot." His Intern Credential (Authorized Field: Moderate/Severe Disabilities) authorizes him to "provide instruction and related services

to individuals with a primary disability of . . . serious emotional disturbance . . . under the joint supervision of "San Jose State University and Santa Clara County."

13. Defendant (SCCOE) provides direct instruction to students in programs such as Special Education. It also provides instructional, administrative, business and technical support services to the county's 32 school districts, including to Defendant ESUHSD. In its staff handbook, SCCOE claims to be "a champion of public education, serving as an exemplary regional resource for students, parents, teachers, school districts, agencies and businesses."

14. SCCOE runs the Foothill Pilot Program (High School) for students with emotional disabilities in facilities located on the campus of an alternative school run by Defendant ESUHSD. The Foothill Pilot Program is the program referred to in SCCOE's contract with the qui tam plaintiff.

15. SCCOE also runs two other classrooms for students with special needs on this campus of an alternative school run by Defendant ESUHSD.

16. Defendant Colleen B. Wilcox, Ph.D., is Santa Clara County Superintendent of Schools and the chief executive officer of Defendant SCCOE.

17. Defendant Joe Fimiami [sic] was the Director of Special Education, SCCOE, and was and continues to be the compliance officer who is charged with receiving complaints "which, if true, would constitute a violation by that local educational agency of federal or state law or regulation governing the programs listed in Section 4610(b) of this Chapter." California Code of Regulations Tittle [sic] 5 § 4630(a).

18. This reference to § 4610(b) includes in subsection (vii) "Special Education programs established pursuant to Education Code Sections 56000 through 56885 and 59000 through 59300." The Foothill Pilot Program in which the qui tam plaintiff is involved is covered by these sections of the Education Code.

19. Defendant David Wong is principal of over 15 special education programs, including the Foothill Pilot program, run by Defendant SCCOE.

20. He is employed to supervise the teachers in the programs he oversees more than half time during any school week.

21. Eastside Union High School District (ESUHSD), makes space available on the campus of one of its alternative schools for three special education classrooms under the SCCOE principal, David Wong (David Wong Classrooms). These three classrooms, which include the Foothill Pilot Program, are in Special Education Local Plan Area (SELPA) number V. ESUHSD and SCCOE are members of this SELPA V.

IV[.] PARTIES

22. Defendants SCCOE and ESUHSD receive funds from three sources to carry out their educational programs. These are the United States Government, the Government of the State of California and Santa Clara County.

23. The Revenue Projection for 2001/2002 SELPA V and the Preliminary Revenue Projection for 2002/2003 says the revenue for SCCOE and the Districts in Santa Clara County come from three sources: "Fed Local, State Aid, Excess Prop Tax."

(pages 29, 31, South East Consortium for Special Education Annual Budget Plan & Annual Service Plan 2002-2003) (See Appendix A-1. All references in this Complaint to A-1 through A-7 are to the Appendix appended to this Complaint.) Another sheet provided to the qui tam plaintiff by the SELPA V, labeled Revenue Comparison East Side, lists East Side Revenue as: "State Aide Revenue, Sp Ed Prop Tax and Fed Local Asst."

24. An analysis of the documents referred to in the preceding paragraph indicates the State Aid for East Side runs between 47% and 50%, the Property tax between 32% and 34% and the Federal Local Assistance is between 18% and 20%.

25. The pages 29 and 31 in the budget document referred to above raise some question about whether the figures may reflect some special adjustment, but they indicate the State Aid for the SCCOE is between 48% and 62%, the Property Tax is between 17% and 22% and the Federal Local Assistance is between 20% and 29%.

26. The federal funds are distributed through the State of California after it certifies to the United States Department of Education that it is complying with the federal laws and regulations.

27. The State, in turn, distributes federal funds and state funds to the County Offices of Education and School Districts who are obliged to submit their educational plans to the State with certifications that they are complying with both the federal and the state laws and regulations.

28. The following description by the United States Court of Appeals for the 4th Circuit describes this

process: "Congress established a three-tiered funding, administration, and implementation scheme, under which the state must submit a plan of compliance to the Secretary of Education which provides federal IDEA funds to the State. See 20 U.S.C. §§ 1412-1414. The state is then responsible for administering the funds on the state level, including the distribution of federal funds to local education agencies (LEAs) and the implementation of policies and procedures to ensure that each LEA expends the funds in a manner consistent with the purpose and substantive provisions of IDEA. See id. §§ 1413(a), 1414(b). In order to qualify for IDEA funds, each LEA must apply to the state education agency (SEA) and provide certain assurances of compliance with IDEA. See id. § 1414(a). The LEA then provides services directly to children with disabilities using the funds obtained from the SEA." *Gadsby v. Grasmick*, 109 F.3d 940, 943 (4th Cir. 1997).

29. Since both federal and state funds were involved in the Foothill Pilot Program and the other SCCOE special education programs at the same location as the Foothill Pilot Program, none of these programs would have been authorized absent the assurances of compliance that were required for these programs. If not authorized to carry on these educational activities they would not have been entitled to use funds collected in Santa Clara County for educational purposes.

30. "Local school boards used to have some control over their property tax revenues. But now, decisions about how much money to allocate to education, and how to do it, are in the hands of the governor and legislators. Their decisions must be made within the

constitutional requirements of Proposition 13 and of Proposition 98, the funding guarantee for kindergarten through community college and state schools." (EdFact: A Primer on School Finance at http://www.ed-data.k12.ca.us/Finance/SF_Prime 2.asp)

V[.] AMOUNTS OF FUNDS DEFENDANTS HAVE USED IN VIOLATION OF THE FALSE CLAIMS ACTS

31. Documents the qui tam plaintiff received from the SELPA in which the Foothill Pilot program is located indicates that the actual costs of the class of programs that includes the Foothill Pilot program runs over $300,000 per year.

32. By June 30, 2002 the Foothill Pilot Program had been running for approximately two and one-half years and it continues to operate.

33. The actual costs of the class of programs that includes the other two classrooms in the David Wong Classrooms significantly exceeded $225,000 per year.

34. The David Wong Classrooms, other than the Foothill Pilot Program, were operating in 1998 when the SCCOE certified its programs were in compliance with the federal and state laws and regulations. They continue to operate.

35. The total actual cost of the programs in the David Wong Classrooms for the period July 1, 2001 through June 30, 2003 was $780,905, and these programs are continuing in the current academic year.

36. The total actual cost of the programs in the other two David Wong Classrooms for the period July 1, 2001 through June 30, 2003 was $935,272.

37. The approximate cost of the Foothill Pilot Program for January to June 30, 2001 is over $150,000. The [a]pproximate cost of the other two David Wong Classrooms for the years July, 1998 through June 30, 2001 is over $1,350,000. Adding these two figures together (over $1,500,000) plus the costs of all three classrooms for July 2002 through June 30, 2003 ($1,716,177), makes the total cost of the three David Wong Classrooms for the period July 1998 through June 30, 2003 over $3,200,000.

38. In addition, the intern program run by the Defendant SCCOE involves another set of expenditures not included above. Defendant SCCOE, in its response to a request for public documents said: "The CCTC [California Commission on Teacher Credentialing] is the sole source of funding for the Intern Program."

39. If this statement by the SCCOE is true, it is an admission of another violation of the law. "Each . . . county office of education that receives a grant shall provide matching funds from any available source in an amount equal to 50 percent of the cost of the alternative certification program, but in no event shall the grant amount awarded to any . . . county office of education exceed two thousand five hundred dollars ($2,500) per intern per year. . . . EDUCATION CODE § 44386(a)[.]

40. The papers that Defendant SCCOE did supply the qui tam plaintiff indicate that the internship teaching program budget summary for FY 1999-2000 had $100,000 funded and $72,700 unfunded. Another sheet marked amendment shows a budget of $50,000 funded and $40,000 unfunded. The latter figure was changed in ink to $43,616 and initialed "EW."

41. On September 29, 2003, Ellen Welt, director of instructional services who is in charge of the intern program, called the qui tam plaintiff saying he had called accounting and asked about the intern program. She said there was no requirement for the county office to provide matching funds, that the intern program was solely a grant from the state based on the number of interns they had in February of each year and that the county spent more on it than it got from the state. When I asked her about the initials EW, she acknowledged that those are her initials, but refused to discuss what "underfunded" meant or anything else about the paper. She said she did not have it before her. When I suggested she get it and call me back, she said she would refer the matter to Ms. Kidwiler, the person who signed the June 10, 2003 letter to me that enclosed this paper with EW handwritten on it. Ms. Welt said she was uncomfortable talking to me and refused to say any more.

42. No indication was given as to whether the differences in these figures were returned to the state, but Ms. Welt told me in the above telephone conversation that what was not used was supposed to be returned. In any event, this indicates that for the four years 1999 – 2003, the SCCOE probably spent over $360,000 on the Intern program and it is still continuing.

43. There is no explanation in these papers what "funded" and "unfunded" mean, but it appears that the "funded" portion is the amount SCCOE received from the CCTC. The source of the funds in the "unfunded" amount is not clear. Information from the CCTC suggests that there may be some federal funds

available for training but the SCCOE's refusal to be forthcoming about the funds in the intern program means that the source and actual amount of these intern funds will probably have to wait until discovery. Indeed, since some of the figures for the overall costs of the David Wong Classrooms are estimates, the exact total amount will not be determinable until after discovery, but it appears the total will be around or over $3,500,000. Approximately 20% of this represents federal funds and 80% state and county funds.

VI[.] STATEMENTS BY THE DEFENDANTS

44. The Assurance Statement in the "Local Plan for Special Education, South East Consortium For Special Education Santa Clara County July 1, 2003 (current Local Plan) says, in part, that it is "the policy of the ESUHSD that a Free Appropriate Public Education is available to all children residing in the ESUHSD between the ages of 3 and 21 inclusive, including children with disabilities who have been suspended or expelled from school. Appropriate education is that combination of educational and related service(s) as determined on an Individualized Education Program (IEP) that meets the unique needs of each individual in order to benefit from his/her access to educational opportunities." Current Local Plan (A-2 p.1)[.]

45. This current Local Plan also provides that it is the "policy of the ESUHSD that all pupils with disabilities have access to the variety of educational programs and services available to non-disabled pupils including nonacademic and extracurricular services and activities." Ibid.

46. This current Local Plan also provides that it is the "policy of the ESUHSD that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled. Special classes, separate schooling, or other removal of children with disabilities from the general educational environment, occurs only when the nature or severity of the disability of the child is such that education in regular classes with the use of supplemental aids and services cannot be achieved satisfactorily." p.2[.]

47. These requirements for a Free Appropriate Public Education, participation in regular educational programs and that this education be in the Least Restrictive Environment are required by federal law. 20 U.S.C. §§ 1400, 1412, the law of California, California Education Code §§ 5600, 56361 and the regulations issued pursuant to those laws.

48. The application for the Local plan for Special Education 1999-2002, (THE PLAN) was signed on various dates between May 27, 1998 and June 26, 1998. It was extended to June 30, 2003. It contains a "CERTIFICATION OF PARTICIPATION, COMPATIBILITY, AND COMPLIANCE ASSURANCES (34 CFR 300L.228-231, 236-237, 239)" (CERTIFICATION FORM) in which Defendant Colleen Wilcox signed the following Certification of Assurances: "I certify, 1) that this plan has been adopted by the appropriate local board(s) (district/county) and is the basis for the operation and administration of special education programs; and 2) that the agency(ies) herein represented will meet all applicable requirements of state and federal laws and regulations, in-

cluding general compliance with Public Law 94-142 [29 U.S.C. § 1400 et seq.], Section 504 of Public Law 93-112[29 U.S.C. § 794], and the provisions of the California Education Code, Part 30. (See specific assurance statements, Section C. on the back of this form.)" Excerpts from THE PLAN are in A-3)[.]

49. The regulations on the back of the CERTIFICATION FORM include: "Reg. 300.224 Personnel development[.] Each application must include procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under Reg. 300.140 (20 U.S.C. 1414(a)(1)(C)(i))" (A-3, p. 1.2)[.]

50. These regulations also include: "Reg. 300.227 Participation in regular educational programs (a) Each application must include procedures to ensure that to the maxim [sic] extent practicable . . . the local educational agency provides special services to enable handicapped children to participate in regular educational programs." (Ibid.)

51. Under THE PLAN, SCCOE is the Responsible Local Agency (RLA), which is "designated by [California] Education Code 56032 to receive and distribute regional funds for the Local Plan, provide for administrative support, and coordinate the administration of the Plan." (A-3, p. 11.5).

52. THE PLAN says that SCCOE "provides programs that the districts do not offer, including special education programs for infants and pupils requiring intensive services. The County and the districts maintain responsibility for their own programs." (A-3, p. 11.1)[.]

53. THE PLAN says that the California "Education Code Section 56602 requires the provision of information for evaluation, which includes, but is not limited, to the following: . . .

a. "Special evaluation studies of statewide impact.

b. "Pupil Performance.

c. "Placement of pupils in least restrictive environments. . . . "

It further provides that:

" . . . the RLA have the information and the system to provide information as it is requested." (A-3 at p. 112-9)[.]

54. Under THE PLAN, SCCOE, as the RLA, and the SELPA, whose director is hired by SCCOE, (A-3, p. 11.5) "accept the responsibility for assuring placement of disabled children into the appropriate least restrictive educational environment." (A-3, p. 11.7)[.]

55. THE PLAN repeats the requirement that services be provided in the least restrictive environment and specifically says that "all local education agencies are required to determine that:

a. "Program options in general education environments are available at local neighborhood schools.

b. "Special education programs, to the maximum extent appropriate to pupil needs, are housed on regular school campuses and dispersed throughout the district.

c. "The physical location of the program facilitates continuing social interaction with non-disabled pupils.

d. "Individuals with exceptional needs have equal access to all general education activities, programs, and facilities on the regular school site and participate in those activities as appropriate to their needs.

e. "Administrative policies and procedures encourage the close cooperation of all school personnel to facilitate opportunities for social interaction between individuals with exceptional needs and non-disabled individuals.

f. "Administrative policies and procedures allow individuals with exceptional needs maximum access to appropriate general education academic programs and school personnel are given necessary support to ensure the pupil's success.

g. "Through long-range commitments for physical housing on regular school campuses, individuals with exceptional needs are afforded opportunities to develop and maintain continuing relationships with non-disabled peers." (A-3, pp. III.1-III.2 & IV. 16-IV.17)[.]

56. A May 4, 2001 communication from the Santa Clara County Office of Education Human Resources Department SCCOE Silicon Valley Internship Program on the subject of Moderate to Severe Internship Standards 15-18 Response, was addressed to the California Commission on teacher Credentialing (CCTC). In this document the SCCOE said: "Supervision and support will be provided to all Interns by

experienced SCCOE special education teachers or Peer Assistance and Review (PAR) Consulting Teachers. Assignment will be made by the Student Services Program Representative and the Intern program. They will be assigned no more than four intern teachers with whom to work." (A copy of what qui tam plaintiff believes is this May 4, 2001 letter is in Appendix A-4[.])

57. The qui tam plaintiff requested a copy of this May 4, 2001 communication under the California Public Records Act. The SCCOE wrote on June 10, 2003: "Neither my staff in Human Resources ("HR") nor the instructional services branch ("ISB") staff were able to find the record you are referring to dated May 4, 2001 to the CCTC. Although your request states that the record was regarding standards 15-18, there is no such document available."

58. The June 10, 2003 SCCOE statement indicates a copy of this June 10 response went to Mary Mulholland, Director of Human Resources, who, the qui tam plaintiff believes, was one of the signers of the May 4, 2001 communication to the CCTC. See A-4 signature page.

59. In the Intern Agreement relating to the qui tam plaintiff, the SCCOE agreed with San Jose State University and the qui tam plaintiff to the following terms on December 21, 2001: (This Intern Agreement is in Appendix A-5).

a. "1. The intern has been assigned to a special education teaching position appropriate to the credential sought. Employment of the intern does not displace a certificated employee in my district.

b. 2. A support provider identified by the principal or administrator will be assigned to assist the intern during the first year of the internship.

c. "4.[sic] My district agrees to pay the intern full salary during the internship."

60. The State of California's assurances to the federal government, which were required in order for the State to receive federal funds for education, were false if these statements by the Defendants were false.

61. Copies of these assurances and other assurances by the defendants will be provided by the governmental plaintiffs when they enter the case and/or by the qui tam plaintiff, after discovery, if necessary.

VII[.] STATUTORY AND REGULATORY REQUIREMENTS INCLUDED IN THE CERTIFICATION FORM'S PHRASE "APPLICABLE REQUIREMENTS OF STATE AND FEDERAL LAWS AND REGULATIONS"

62. Federal Laws include, but are not limited to:

a. Section 504 of Public Law 93-112, 29 U.S.C. § 794, which is quoted at page VII-48 of THE PLAN: "No otherwise qualified individual with handicaps in the United States shall, solely by reason of her or his handicap, as defined in Section 706(8) of this title, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity

conducted by any Executive agency or by the United States Postal Service."

b. Public Law 94-142, 20 U.S.C. § 1400 et seq., as amended, known as the "Individuals with Disabilities Education Act" (IDEA), [and]

c. The No Child Left Behind Act of 2001, Public Law 107-110, January 8, 2002, (20 U.S.C. § 6301 and various other sections of the U.S.C.) which, according to a speech by U.S. Secretary of Education Rod Paige on July 8, 2002, ". . . includes blind children and other students with disabilities."

63. Federal regulations include, but are not limited to:

a. 34 CFR Part 200

b. 34 CFR Part 300

as they existed on all relevant dates.

64. California laws include, but are not limited to, the California Education Code (EDUCATION CODE), including:

a. The finding that "all individuals with exceptional needs have a right to participate in free appropriate public education. . . . " EDUCATION CODE §5600[.]

b. "Education programs are provided under an approved local plan for special education that sets forth the elements of the programs in accordance with this part." EDUCATION CODE § 56001(f).

c. "Individuals with exceptional needs are offered special assistance programs that pro-

mote maximum interaction with the general school population in a manner that is appropriate to the needs of both. . . . " EDUCATION CODE § 56001(g)[.]

d. "Appropriate qualified staff are employed, consistent with credentialing requirements, to fulfill the responsibilities of the local plan. . . ." EDUCATION CODE § 56001(n).

e. "Regular and special education personnel are adequately prepared to provide educational instruction and services to individuals with exceptional needs." EDUCATION CODE § 56001(o)[.]

f. "Special education is an integral part of the total public education system and provides education in a manner that promotes maximum interaction between children or youth with disabilities and children or youth who are not disabled, in a manner that is appropriate to the needs of both." EDUCATION CODE §56031[.]

g. "Each special education local plan shall ensure that a continuum of program options is available to meet the needs of individuals with exceptional needs for special education and related service, as required by the Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) and federal regulations relating thereto." EDUCATION CODE § 56360.

h. "The continuum of program options shall include, but not necessarily be limited to, all of the following or any combination of the following: (a) Regular education programs consistent

with subparagraph (A) of paragraph (5) of subsection (a) of Section 1412 of Title 20 of the United States Code and implementing regulations. * * *" EDUCATION CODE § 56361[.]

i. The Teacher Education Internship Act of 1967, EDUCATION CODE §§ 44450-44468 including "A school district shall give special supervision and assistance to each intern above and beyond that given to other newly certificated and newly employed school personnel."

j. "No one shall be employed to supervise the work of teachers for more than half time during any school week unless he is the holder of a valid teacher's certificate authorizing him to teach in the schools and classes in which he is to supervise instructions and a valid supervision certificate." EDUCATION CODE § 44870[.]

k. "[A]ppropriate personnel in the employing school district shall counsel with the intern and a total program . . . shall be planned. The county superintendent of schools shall be involved in the program planning in the case of a joint recommendation." Education Code § 44457[.]

l. Interns are required to be assisted and guided by a mentor or certificated employee selected through a competitive process. These mentors or other certificated employees must be an employee of the district hiring the intern and "shall possess valid certification at the same level, or of the same type, of credential as the

district interns they serve." Education Code § 44830.3(a).

m. "The program shall meet the instructional or service needs of the district with the primary objective being to increase the effectiveness of the intern in the district.["] Education Code § 44458[.]

n. "The supervisory help and guidance of interns as they pursue their school district responsibilities are important for the success of such programs. . . . [S]chool districts, and county superintendents of schools in the case of joint recommendations, may enter into agreements with colleges and universities for the employment of staff for such supervision." Education Code § 44461[.]

o. "A school district shall give special supervision and assistance to each intern above and beyond that given to other newly certificated and newly employed school personnel." Education Code § 44465[.]

p. The "internship credential shall be issued initially for a two-year period. . . . " Education Code § 44455[.]

q. "The superintendent of the school district or the superintendent's designee shall give 30 days' prior written notice of dismissal, not later than March 15 in the case of second year probationary employees. The notice shall include a statement of the reasons for the dismissal and notice of the opportunity to appeal." Education Code § 44948.3(a)(1).

65. Regulations of the State of California include, but are not limited to: Title 5 of the California Code of Regulations (CCR).

VIII[.] ACTIONS BY THE DEFENDANTS THAT MADE THEIR STATEMENTS FALSE

66. The following actions demonstrate that the statements referred to above by the defendants were false at the time they were made, either because they constituted representations of fact that were not true or representations of what defendants intended when they had no such intentions as evidenced by their future actions.

67. In contrast to their statements promising to meet all applicable requirements of state and federal laws and regulations, and the assurance of the SCCOE in the Intern Agreement relating specifically to the qui tam plaintiff that the intern "has been assigned to a special education teaching position appropriate to the credential sought," the qui tam plaintiff was required to obtain an intern credential for Moderate/Severe. (A copy of this Intern Agreement is attached as A-5[.])

68. The appropriate credential for the position to which he was assigned was Mild/Moderate because the students in the Foothill Pilot Program were generally of average or higher intelligence and none of them fit in the traditional categories of Moderate/Severe, which include such conditions as autism and mental retardation.

69. The Moderate Severe program put time pressures on the qui tam plaintiff that prevented his teaching of students with emotional disability but average or higher intelligence, for example: an as-

sessment class relevant to the type of students in the Foothill Pilot Program, and a class in teaching reading to students with reading difficulties.

70. The principal under whom the qui tam plaintiff worked during the 2001-2002 school year told the qui tam plaintiff that the appropriate credential was the special education mild to moderate, not moderate to severe, but suggested he would wait until later to try to get that changed. This principal retired in the summer of 2002.

71. Defendant David Wong became the principal to whom the qui tam plaintiff reported in the summer of 2002. One of the first items that this principal commented on was the need to assess the students, but the qui tam plaintiff was advised by his intern advisor at San Jose State University that the appropriate assessment course for the type of students the qui tam plaintiff was teaching was not included in the Moderate/Severe intern program in which he was participating. She said that course was in the Mild/Moderate program.

72. The qui tam plaintiff advised Defendant David Wong of this and talked with him about the assessment course, but David Wong, to the best of the qui tam plaintiff's knowledge, did nothing to change the qui tam plaintiff into the more appropriate Mild/Moderate program.

73. At least one of the teachers in the portables where qui tam plaintiff was teaching had only an emergency education specialist instruction permit, authorized for "Mild/Moderate Disabilities." This credential required six semester units per year for it to be renewed in contrast to the approximately

thirty-nine credits that the qui tam plaintiff was supposed to complete in two years. But the six credits the emergency permit teacher was required to take included the assessment course that the qui tam plaintiff would have taken if he had been in the Mild/Moderate intern program.

74. This teacher, with only an emergency credential, replaced the qui tam plaintiff when the qui tam plaintiff was not rehired.

75. Despite the assurance given by the SCCOE that "Supervision . . . will be provided to all Interns by experienced SCCOE special education teachers. . . ." (May 4, 2001)(A-4), as required by EDUCATION CODE §44870, and despite EDUCATION CODE § 44465's requirement that "A School district shall give special supervision and assistance to each intern above and beyond that given to other newly certificated and newly employed school personnel", the SCCOE has admitted in its June 10, 2003 response to the qui tam plaintiff's request for public records that "There is no supervision piece in the Intern Program with the SCCOE."

76. In this response to the qui tam plaintiff's request for public documents the SCCOE later said: "Your principal is your supervisor and evaluator."

77. According to the CCTC website for checking the credentials of teachers, Defendant David Wong has neither a Moderate/Severe nor a Mild/Moderate credential.

78. SCCOE says that EDUCATION CODE § 44870 "is referring to personnel that are not principals" but that section says "No one shall be employed to supervise the work of teachers for more than half the

time during any school week unless he is the holder of a valid teacher's certificate authorizing him to teach in the schools and classes in which he is to supervise instruction and a valid supervision certificate." (emphasis added.) This does not say "No one other than principals." Moreover, this requirement is for another certificate in addition to the supervision certificate.

79. In any event, any supervision by Defendant David Wong does not satisfy the assurance of the SCCOE that the qui tam plaintiff would be supervised by someone with the proper credential as required by the SCCOE's assurances in the May 4, 2001 communication and reinforced by EDUCATION CODE § 44465.

80. Despite the SCCOE commitment in the Intern Agreement relating specifically to the qui tam plaintiff that "A support provider identified by the principal or administrator will be assigned to assist the intern during the first year of the internship," and the assurance in the May 4, 2001 communication that ". . . support will be provided to all Interns by experienced SCCOE special education teachers. . . .", the SCCOE has not indicated any such support was given the qui tam plaintiff in his first year as an intern which started on January 2, 2002.

81. Indeed, SCCOE says the qui tam plaintiff's Support Provider was Cathie Colson, but the log of her activity with respect to providing support to the qui tam plaintiff shows her first attempt to visit his site was 12/19/02 but says she was unable to reach him because the portable area was flooded.

82. The Foothill Pilot Program (High School) never had to cancel any classes due to flooding while the qui tam plaintiff was teaching there.

83. The site visit she made on January 8, 2003, which was the first time she talked to the qui tam plaintiff, was reported in her log as "Observed John for 10 minutes, conferenced [sic] for 30 minutes. Teaching Eng,. Govt, Math, Science, PE (some mainstreamed for history &/or PE). Concerns expressed – hasn't received texts – keyboarding needs switch to connect to internet.[]"

84. This was more than a year after the qui tam plaintiff became an intern; the only time he saw her in the classroom; and she never communicated with him again.

85. Her log also reports that she exchanged E-mails with Defendant David Wong in January and was told on January 15 that "he [Defendant David Wong] is "ready to evaluate John out."

86. Defendant David Wong did not conduct his "Second Formal Evaluation" until February 13, 2003.

87. After the first page of Cathie Colson's log, including an entry on 3/14/03 saying that the qui tam plaintiff was not staying in the program, a second page adds another item for 1/8/03 saying "Possible areas to improve – had detailed plans for the day but didn't stick to them. Doesn't seem to have long range plans for semester."

88. Cathie Colson never told the qui tam plaintiff that he should not be flexible in connection with the daily schedule and gave him no suggestions for long-range plans for this class.

89. In fact, no one ever gave him any guidance about the subjects to be covered in this class.

90. Even teachers who are not interns, both regular education and special education teachers, are supposed to be given staff development. Education Code §§ 56240-56245. In particular, "regular education teachers serving individuals with exceptional needs [are to be provided] appropriate training each year relating to the needs of those individuals." Education Code § 56243.

91. A ten-minute observation and a brief conference more than a year after the qui tam plaintiff became an intern does not satisfy either the promises made by SCCOE or the California law regarding extra support for intern teachers.

92. During the fall of 2002, Defendant David Wong initially refused permission for the qui tam plaintiff to visit two other high school classes, which was required for a special education course the qui tam plaintiff was taking at San Jose State University in the intern program.

93. Only after the qui tam plaintiff complained to the SCCOE intern program director, did Defendant David Wong permit the qui tam plaintiff to make the required visits.

94. Despite the assurances that SCCOE gave about complying with the federal and state laws, and the requirements of these laws to provide a "free appropriate public education" in the "least restrictive environment" including not depriving handicapped persons of the benefits of a program receiving federal financial assistance, Defendant David Wong prevented the qui tam plaintiff from ordering student

copies of the government text that was being used in the ESUHSD until approximately half way through that course.

95. Although the qui tam plaintiff explained to Defendant David Wong in the summer of 2002, during or about the last week of July, that he had been told by the SCCOE that texts to be used could be those that were used in the school district where his site was located and that the text he wished to order was being used in ESUHSD, David Wong refused to discuss this. He said that would have to wait until he held a curriculum meeting with the qui tam plaintiff and the other two special education teachers under his supervision at the Foothill site. That meeting never happened.

96. In the fall of 2002 the qui tam plaintiff requested three $29.95 student copies of a text to use in conjunction with teaching a course in computer applications for the Apple computers that were located in the classroom.

97. Defendant David Wong turned this request down without notifying the qui tam plaintiff until he inquired about what had happened to the order. When asked about this, Defendant David Wong, on or about November 22, 2002, again said that order would have to wait until he had a meeting with the qui tam plaintiff about the curriculum.

98. In the meantime Defendant David Wong said to stop teaching the computer course until this meeting was held.

99. He subsequently met with the qui tam plaintiff on or about December 2, 2002 and promised to get

the books, but the qui tam plaintiff never received these books.

100. The qui tam plaintiff also requested, on numerous occasions, that the Apple computers located in the classroom be connected to the Internet so the students could learn how to use that resource.

101. The qui tam plaintiff believes that the students in the other portables under Defendant David Wong's authority at the Foothill site had such connections available and that the students in the ESUHSD alternative school on whose grounds the Foothill Pilot Program (High School) was located had such connections.

102. Nevertheless, despite repeated requests to Defendant David Wong and conversations with technology specialists in SCCOE and ESUHSD and complaints to the "Support Provider" who saw the qui tam plaintiff in January, 2003, these connections, like the computer texts, were never made available for the qui tam plaintiff's students.

103. Another part of the federal and state laws that applies to special education students as well as to students in general education is that the schools be accountable for educating the students.

104. There are a number of tests that can be reviewed for this accountability including statewide testing referred to as "STAR Tests." Other tests that may be relevant to this are the proficiency tests that school districts use to see that their students meet graduation requirements and the California High School Exit Exams which were given in the 2002-2003 school year to students expecting to graduate in 2004 or thereafter.

105. When the qui tam plaintiff inquired about the exit exam for one of his students in the fall of 2002, Defendant David Wong said he did not know about the exit exam and implied that the qui tam intern teacher should have told him about it earlier. As a result that student was not allowed to take the exit exam in the fall of 2002.

106. Another student was a senior and scheduled to graduate in 2003 if he passed the East Side Union High School proficiency test. Defendant David Wong gave no effective support to the qui tam plaintiff to get this test. The qui tam plaintiff finally obtained it in time to be given, but on or about the time of its administration, Defendant David Wong criticized him for spending the time to get this test.

107. When the qui tam plaintiff tried to get the exit exam in the spring of 2003 for the student who was not allowed to take it in the fall of 2002, the Defendant gave very little, if any, support and told the qui tam plaintiff that this student would not be able to pass it.

108. The qui tam plaintiff obtained the test from another school district at the end of February 2003 and the student passed both parts of the exam the first week of March.

109. The giving of this exam has since been suspended because the Department of Education had decided that, in view of the large number of failures, the students were not getting enough preparation to take it.

110. When the Star Testing was administered in the spring of 2003, the materials given to special education teachers under Defendant David Wong's super-

vision at the Foothill site did not include all parts of the tests. The qui tam plaintiff was able to obtain the missing part for one of his students who lived outside the ESUHD [sic], but he was instructed by Defendant David Wong that he should not try to obtain the missing part for any students living in the ESUHSD.

111. The qui tam plaintiff understands that Defendant David Wong also instructed the Teacher in Charge, who was obtaining the materials from ESUHSD for the David Wong Classrooms, not to request the missing materials for the classes under David Wong's jurisdiction at the Foothill site.

112. Defendant David Wong explained that he was having a discussion as to whether the ESUHSD or the SCCOE should be supplying this test which is used to measure the accountability for the educational program. Defendant David Wong believed the ESUHSD should provide these tests, which presumably means that ESUHSD would be held accountable for the students the SCCOE is teaching for that District.

113. This is contrary to THE PLAN, which provides that "The County and the districts maintain responsibility for their own programs." (A-3 p. 11.1)[.]

114. Because of all the above actions by the County Defendants, the students in the Foothill Pilot Program (High School) have not been receiving the "Free Appropriate Public Education" to which they are entitled under state and federal law and for which the County Defendants received public funds.

115. During the fall of 2002, the qui tam plaintiff tried to get the Defendant principal David Wong and the Defendant ESUHSD to make clear what the re-

quirements were for graduation for the senior referred to above who took the proficiency test. Defendant David Wong said that was the responsibility for the Program Specialist, an employee of the ESUHSD.

116. On or about October 1, 2002 the Program Specialist refused to discuss these graduation requirements in an IEP meeting and said this was not an appropriate topic for an IEP meeting. Later she and the Defendant David Wong claimed that they were working on the problem, but the student was not allowed to attend any graduation ceremony and has not yet received a diploma.

117. The senior referred to did pass the proficiency test and neither the qui tam plaintiff nor, to the best of his knowledge, the senior received any information that he had not passed more than enough credits in the appropriate subjects to satisfy the graduation requirements.

118. When the parents of the student asked the qui tam plaintiff about this in August, 2003, he called personnel in the SCCOE and the director of Special Education in ESUHSD.

119. They both said that the responsibility for sorting out the diploma problem is that of Defendant David Wong.

120. The qui tam plaintiff left a message on Defendant David Wong's voice mail in August asking about the diploma for this senior but the call was never returned.

121. Because of the above actions or inaction by the County Defendants and the ESUHSD, the senior has

been deprived of what he is entitled to under federal and state laws and regulations despite the fact that both the County Defendants and Defendant ESUHSD received public funds to educate this student who resided in the ESUHSD during the time he completed his requirements for graduation.

122. Another senior, who resides in the ESUHSD, completed his graduation requirements during the summer of 2003, but he has also not received his diploma.

123. In addition to this clear violation of failing to provide the benefits of a "Free Appropriate Public Education" to these seniors, Defendants SCCOE and the ESUHD [sic] located the Foothill Pilot Program (High School) where the students are not in the least restrictive environment.

124. The Foothill Pilot Program (High School), along with the special education classes under Defendant David Wong's jurisdiction in the two adjacent portables, (the David Wong Classrooms) appear to be included in THE PLAN as SED Special Classes within the East Side Union High District, "Other Operated" (A-3 p. III.12).

125. The David Wong Classrooms are not located on the campus of a general education high school but are located on the grounds of an alternative school called the Foothill High School. ESUHSD describes alternative education as fol ows: "Alternative Education is an option for students who are not finding success in the traditional high school." (See ESUHSD website http://www.esuhsd.org/schools.html at "Information (fh)")[.]

126. The Teacher in Charge in the David Wong Classrooms has emphasized that the students in these classrooms are not to be allowed on the main grounds of the alternative school without being supervised. This requires that these teen-agers [sic] ranging in ages up to and including 18 must be escorted to and from the bathroom and to the area where they pick up their lunches, which are eaten back in the area exclusively used by the SCCOE for special education classes.

127. The qui tam plaintiff understands that this is at least in part because that is necessary to satisfy the principal of the Foothill Alternative School.

128. It is understood that this generally also means that there should be no socializing with the students in the alternative school.

129. In fact, during the qui tam plaintiff's tenure at the Foothill Pilot Program (High School) he has never seen any socializing between students in the David Wong Classrooms and the students in the ESUHSD alternative school.

130. The students that are full time in the David Wong Classrooms do not have access to the athletic facilities or extracurricular activities commonly available in general education high schools.

131. These facilities to which the students in the David Wong Classrooms do not have access include such athletic facilities as a track, gymnasium, weights, indoor basketball, and football and soccer fields. Extra curricular activities they have no access to include team sports, band, cheerleading, and various clubs.

132. The general high school education facilities at which students in the David Wong Classrooms can take general education classes are at a sufficient distance that special transportation is usually provided, and it is not feasible to take any classes there unless it is the beginning or the end of the day.

133. The submission of Local Plans from SELPA V that described the SCCOE special education programs operated on ESUHSD's Foothill campus was a joint venture, combination or conspiracy in which compliance with all appropriate laws and regulations was assured.

134. In fact, SCCOE and ESUHSD not only intentionally gave these false assurances upon which the funding was dependant [sic], but they conspired to violate the laws guaranteeing a free appropriate public education in the least restrictive environment by locating this special education program on an alternative school campus and prohibiting any social contact between the special education students and the alternative school students.

135. The wrongful acts and omissions described in paragraphs 115 through 134 are attributable to both the County Defendants and ESUHSD and any such acts of any defendants shall be deemed to be the act of each defendant acting individually, joint, or severally. Each of the defendants participated in and received funds as a result of the conspiracy alleged herein.

IX[.] THE QUI TAM PLAINTIFF'S COMPLAINTS ABOUT THE LACK OF SUPPORT

136. In addition to the requests for support addressed to Defendant David Wong, the qui tam

plaintiff sent written complaints about the lack of support he was receiving on at least three different occasions (on or about September 9, 2002, February 23, 2003 and March 9, 2003) with copies to Defendant Joe Fimiani, the compliance officer for SCCOE.

137. On the last written complaint about the lack of support the qui tam plaintiff specifically listed some of the laws and commitments that had been violated with citations to specific statutes.

138. This complaint also specifically referred to some of the damages that might be attributable to the lack of support the qui tam plaintiff had received. Consequently, SCCOE was aware that the qui tam plaintiff was considering litigation based on the Defendants' violations of law.

139. Despite Defendant Joe Fimiani's role as compliance officer for the complaint procedure about violations of law under Title 5 CCR §4630(a), the qui tam plaintiff never received any response from Defendant Fimiani.

140. The agency at the state level responsible for the intern programs is the California Commission on Teacher Credentialing and a copy of this last complaint was also sent to Dr. Sam W. Swofford, Executive Director, California Commission on Teacher Credentialing, 1900 Capitol Avenue, Sacramento, CA 95814.

141. The qui tam plaintiff received no response from the State of California.

142. During the course of the year the observations that a general education elementary teacher assigned to mentor the qui tam plaintiff never resulted

in any suggestion that the qui tam plaintiff was doing an unsatisfactory job.

143. Quite the contrary, the notes this mentor teacher took on her observations of the qui tam plaintiff were quite favorable.

144. Defendant David Wong's first evaluation of the qui tam plaintiff, on or about October 10, 2002, noted that he was a beginning teacher and suggested areas for improvement but did not indicate the qui tam plaintiff's teaching was unsatisfactory.

145. Defendant David Wong's evaluation on February 13, 2003 (almost a month after he had told Cathie Colson that he was "ready to evaluate John out") said the qui tam plaintiff's performance was unsatisfactory but provided no specific exemplars where progress was not evident and made no specific recommendations to assist with improvement as required by the Scheduled Observation form.

146. The only specific suggestion Defendant David Wong ever gave the qui tam plaintiff was that a student with reading difficulty should not be given books written in the first person to read because it was easier to read books in the third person.

147. Neither the qui tam plaintiff's mentor teacher nor his professors in teaching reading and methods at San Jose State University have ever heard of this alleged advantage of books written in the third person over books written in the first person. As one of his San Jose State professors told the qui tam plaintiff, "What is found, over and over again, is that the books need to be interesting to the reader." The book the student was reading was about a boy his age in a sailboat lost in the ocean.

148. The qui tam plaintiff requested a formal scheduled classroom observation by an administrator other than David Wong. This observation occurred on March 23, 2003.

149. The other administrator, another principal of special education programs run by SCCOE, did not rate the qui tam plaintiff unsatisfactory in any category and instead checked "emerging" or "applying" on all categories he observed. These categories are both higher than the "beginning" category that David Wong has used in his fall 2002 observation.

150. Specific comments by this other principal included: "positive classroom environment; reflects what's being taught; behavior standards posted; objectives of the lesson were clear; traditional strategies used [including] read aloud; board work; time lines; lecture; worksheets; visuals used[;]" He also reported "referenced previous learning; clarified terms; good use of questioning strategies; adjusted assignments for kids; kept walking around; positive reinforcement [with] verbal; chips; agreements."

151. Nevertheless, the qui tam plaintiff was not reelected.

152. The qui tam plaintiff believes he was not reelected because he had raised too many complaints about the lack of support he had been given by Defendant David Wong. The subject of these complaint [sic] was the harassment of the qui tam plaintiff by David Wong, forcing the qui tam plaintiff to participate in the fraudulent activity of purporting to educate students under conditions imposed by the County Defendants that prevented these students from getting a free appropriate public education.

153. When the qui tam plaintiff raised a question with Human Resources about why he was being sent a "non-reelection" letter, he was told that the SCCOE did not have to give any reason and refused to discuss the matter.

154. However, in the response to the qui tam plaintiff's request for documents, the SCCOE said: "The Education Code allows any school district or County office to non-reelect any probationary, provisional, temporary or intern teacher if there is not a strong match between the person and the organizations [sic] standards up to March 15th of their second full year of service." June 10, 2003 letter from SCCOE to the qui tam plaintiff, p. 1.

155. No citation was given for this statement. No evidence was ever given the qui tam plaintiff indicating that there was not a strong match between him and the SCCOE standards.

156. There is no provision in the Education Code that requires a "strong match between the person and the organizations [sic] standards" before an intern is re-elected. The observation reports by his mentor teacher and by the second principal to observe him indicated he was meeting the standards of the SCCOE.

157. March 15th of the second full year of service would permit an intern who was initially hired at the beginning of a school year to complete the intern program within the prescribed two years.

158. The qui tam plaintiff was not hired until the middle of the school year. Consequently, a notice by March 15 not to continue the next school year prevented him from having a second full year of service,

which is required for him to complete his internship within the allotted time of two years.

159. Both the SCCOE human resources spokesperson and a union representative suggested the qui tam plaintiff might consider resigning so he would not have "non-reelected" on his record.

160. The qui tam plaintiff believes this was an attempt to forestall litigation.

161. This is also a recognition by the Defendant SCCOE that "non-reelected" is something different from the expiration of a contract.

162. Defendant SCCOE wrote to the qui tam plaintiff on or about August 5, 2003 that he is not eligible for substitute teaching in the SCCOE because he was not re-elected.

163. Subsequent to that letter, the qui tam plaintiff was offered and did substitute three days, but it appears doubtful that he will get any further calls to substitute for the SCCOE.

164. If the SCCOE had just let the contract expire by its own terms the qui tam plaintiff would have been able to substitute for the SCCOE. In the spring of 2001, the qui tam plaintiff had worked for the SCCOE and was not rehired for the following year because the class he was teaching was not being offered the next year, but he did a substantial amount of substituting for the SCCOE after the end of the class he was teaching until he was hired for the special education teaching position that is described in this complaint.

165. Other consequences of not being re-elected are that the qui tam plaintiff:

a. was told by the Defendant SCCOE in a letter dated March 20, 2003[,] that he would not be considered in the open transfer process within SCCOE,

b. was not told in the notice relating to the expiration of his contract "This in no way reflects upon the quality of your services as an employee of the Santa Clara County Office of Education," as he was when his January 2002 contract expired on June 30, 2002.

c. was told he was ineligible to apply for other teaching positions in the SCCOE as a result of his being non re-elected.

166. When the qui tam plaintiff was previously notified that he would not be working beyond the semester he was then teaching for SCCOE, he was allowed to:

a. participate in the transfer process, as he did in the spring of 2002,

b. teach both as a substitute, as he did beginning July 1, 2001, and later, full-time for the SCCOE as he did beginning in December 2001, or

c. continue in his full-time SCCOE teaching position, as he did beginning July 1, 2002.

167. Although the qui tam plaintiff was able to obtain a summer job, he has not been able to obtain full-time employment.

168. At least some of the school districts to which the qui tam plaintiff has applied, hired individuals that already had their full credentials.

COUNT I

(County Defendants)

Violations of False Claims Act, 31 U.S.C. § 3729(a)(1), (a)(2) with respect to the Foothill Pilot Program

169. Paragraphs 1-168 are hereby incorporated by reference.

170. From June 1998 through the present, the County Defendants knowingly (as defined in 31 U.S.C. § 3729(b)) made, used or caused to be made or used documents, including a "Certification of Participation, Compatibility, and Compliance Assurances" and other reports and assurances containing false or fraudulent statements regarding eligibility and compliance with all applicable requirements of state and federal laws and regulations, in order to get funds paid or approved by the United States Department of Education pursuant to County Defendants' participation in federal programs for the support of education, particularly for the support of the education of students with special needs.

171. These statements resulted in the California Department of Education representing to the United States Department of Education that all laws and regulations were being complied with in order to receive money from the federal government that ultimately went to the County Defendants.

172. In fact, all relevant laws and regulations were not being complied with.

173. By reason of the foregoing, County Defendants presented or caused to be presented to the United States, false claims for payment.

174. Based on the foregoing acts, the United States has paid claims and sustained damages in excess of $185,000 paid pursuant to County Defendants' participation in Federal Local Assistance for the Foothill Pilot Program (High School) for education programs funded by the Department of Education and an additional undetermined amount, estimated to be about $72,000 in connection with other programs funded by the United States Department of Education, for example training programs.

175. County Defendants are liable under the False Claims Act for three times the amount of approximately $258,000 plus a $5,000 to $10,000 civil penalty for each false claim presented or caused to be presented to the United States Department of Education, a portion of which will be awarded to the qui tam plaintiff. The County Defendants are also liable for reasonable expenses necessarily incurred, plus reasonable attorneys' fees and costs of the qui tam plaintiff.

COUNT II

(County Defendants and ESUHSD)

Violation of False Claims Act, 31 U.S.C. § 3729(a)(1), (a)(2) with respect to all the SCCOE Special Education Programs on the Foothill Campus

176. Paragraphs 1-168 are hereby incorporated by reference.

177. From at least June, 1998 through the present, County Defendants and Defendant ESUHSD knowingly (as defined in 31 U.S.C. § 3729(b)) made, used or caused to be made or used documents, including a

"Certification of Participation, Compatibility, and Compliance Assurances" and Local Plans for the provision of Special Education, and other reports and assurances, containing false or fraudulent statements regarding eligibility to receive federal funds, including false statements regarding compliance with all applicable requirements of state and federal laws and regulations.

178. These false or fraudulent statements were made to get funds paid or approved by the United States Department of Education pursuant to these Defendants' participation in federal programs for the support of education, particularly for the support of the education of students with special needs.

179. Contrary to their assurances, they did not comply with these laws and regulations, which include requirements to provide special education in the least restrictive environment with opportunities for these students to socialize with, and derive the same benefits as regular education students receive from a free appropriate pubic [sic] education, including graduation ceremonies, earned high school diplomas, access to special facilities and extra-curricular activities.

180. These statements resulted in the California Department of Education representing to the United States Department of Education that all laws and regulations were being complied with in order to receive money from the federal government that ultimately went to the County Defendants.

181. By reason of the foregoing, County Defendants and the ESUHSD presented or caused to be pre-

sented to the United States, false claims for payment.

182. Based on the foregoing acts, the United States has paid claims and sustained damages in excess of $640,000 paid pursuant to the participation of the County Defendants and Defendant ESUHSD in Federal Local Assistance for education programs funded by the Department of Education.

183. County Defendants and Defendant ESUHSD are liable under the False Claims Act for three times the amount of at least $640,000 plus a $5,000 to $10,000 civil penalty for each false claim presented or caused to be presented to the United States Department of Education, plus pre-judgment and post-judgment interest, a portion of which will be awarded to the qui tam plaintiff. The County Defendants and Defendant ESUHD [sic] are also liable for reasonable expenses necessarily incurred, plus reasonable attorneys' fees and costs of the qui tam plaintiff.

COUNT III

(County Defendants and ESUHSD)

Conspiracy to Violate False Claims Act, 31 U.S.C. § 3729(a)(3) with respect to all the SCCOE Special Education Programs on the Foothill Campus

184. Paragraphs 1-168 are hereby incorporated by reference.

185. From at least June, 1998 through the present, County Defendants and Defendant ESUHSD conspired to defraud the Government by getting false or fraudulent claims allowed or paid by knowingly (as

defined in 31 U.S.C. § 3729(b)) making, using or causing to be made or used documents, including a "Certification of Participation, Compatibility, and Compliance Assurances" and Local Plans for the provision of Special Education, and other reports and assurances containing false or fraudulent statements regarding eligibility, including false statements regarding compliance with all applicable requirements of state and federal laws and regulations, including the requirements to provide special education in the least restrictive environment with opportunities for these students to socialize with, and derive the same benefits as regular education students get from our free and public education system, including graduation ceremonies, earned high school diplomas and access to athletic facilities and clubs.

186. Contrary to their assurances, the defendants conspired to prevent the students in the David Wong classrooms from obtaining a free appropriate public education by placing these students in an environment that prevented them from associating with regular students, prohibiting them from associating even with the alternative school students and not permitting them to receive diplomas at graduation ceremonies with regular education students.

187. These false or fraudulent statements were made to get funds paid or approved by the United States Department of Education pursuant to these Defendants' participation in federal programs for the support of education, particularly for the support of the education of students with special needs.

188. These statements resulted in the California Department of Education representing to the United States Department of Education that all laws and

regulations were being complied with in order to receive money from the federal government that ultimately went to the County Defendants.

189. By reason of the foregoing, County Defendants and the ESUHSD presented or caused to be presented to the United States, false claims for payment.

190. Based on the foregoing acts, the United States has paid claims and sustained damages in excess of $640,000 paid pursuant to the participation of the County Defendants' [sic] and ESUHSD in education programs funded by the Department of Education, including the Federal Local Assistance program.

191. County Defendants and Defendant ESUHSD are liable under the False Claims Act for three times the amount of at least $640,000 plus a $5,000 to $10,000 civil penalty for each false claim presented or caused to be presented to the United States Department of Education, a portion of which will be awarded to the qui tam plaintiff. The County Defendants and Defendant ESUHD [sic] are also liable for reasonable expenses necessarily incurred, plus reasonable attorneys' fees and costs of the qui tam plaintiff.

COUNT IV

(County Defendants)

Violations of California False Claims Act, Government Code § 12650 et seq. including § 12651(a)(1), (a)(2) with respect to the Foothill Pilot Program

192. Paragraphs 1-168 are hereby incorporated by reference.

193. From June 1998 through the present, the County Defendants knowingly (as defined in Government Code § 12650(b)(2)) made, used or caused to be made or used documents, including a "Certification of Participation, Compatibility, and Compliance Assurances" and other reports and assurances containing false or fraudulent statements regarding eligibility to receive state and county funds. These statements regarded compliance with all applicable requirements of state and federal laws and regulations.

194. These false or fraudulent statements were made to get funds approved by the State of California and to get funds from the State of California and Santa Clara County for the support of education, particularly for the education off [sic] students with special needs and the University Intern Program.

195. Contrary to their assurances they did not comply with these laws and regulations which include requirements to provide appropriately credentialed and supported teachers to give these students a free appropriate public education in the least restrictive environment with opportunities for these students to socialize with and derive the same benefits as regular education students receive from a free appropriate public education, including graduation ceremonies, earned high school diplomas, access to special facilities and extra-curricular activities.

196. By reason of the foregoing, County Defendants presented or caused to be presented to California and to Santa Clara County, false claims for payment.

197. Based on the foregoing acts, California and Santa Clara County have paid claims and sustained

damages in excess of $744,000 pursuant to County Defendants' participation in an educational program called Foothill Pilot Program (High School) funded in part with California State and Santa Clara County funds and an additional estimated $288,000 in connection with other programs funded with the same monies, for example training programs.

198. County Defendants are liable under the False Claims Act for three times an amount exceeding $1,032,000 plus up to $10,000 civil penalty for each false claim presented or caused to be presented to the State of California and Santa Clara County, a portion of which will be awarded to the qui tam plaintiff. The County Defendants are also liable for reasonable expenses necessarily incurred, plus reasonable attorneys' fees and costs of the qui tam plaintiff.

COUNT V

(County Defendants and ESUHSD)

Violation of California False Claims Act, Government Code[] § 12650 et seq. including § 12651(a)(1), (a)(2) with respect to all the SCCOE Special Education Programs on the Foothill Campus

199. Paragraphs 1-168 are hereby incorporated by reference.

200. From at least June, 1998 through the present, County Defendants and Defendant ESUHSD knowingly (as defined Government Code. § 12650(b)(2)) made, used or caused to be made or used documents, including a "Certification of Participation, Compatibility, and Compliance Assurances" and Local Plans

for the provision of Special Education, and other reports and assurances containing false or fraudulent statements regarding eligibility to receive public funds from the State of California and Santa Clara County, including false statements regarding compliance with all applicable requirements of state and federal laws and regulations.

201. These false or fraudulent statements were made to get funds paid or approved by the State of California and Santa Clara County, for Defendants' participation in programs for the support of education, particularly for support of the education of students with special needs.

202. Contrary to their assurances, the County Defendants and ESUHSD did not comply with the applicable laws and regulations, which include:

a. providing a free appropriate public education

b. in the least restrictive environment

c. with opportunities for these students to socialize with, and derive the same benefits as regular education students, including

    i. graduation ceremonies,

    ii. earned high school diplomas, and

    iii. access to special facilities and extracurricular activities.

203. By reason of the foregoing, County Defendants and the ESUHSD presented or caused to be represented to the State of California and to Santa Clara County, including its school districts, false claims for payment.

204. Based on the foregoing acts, the State of California and Santa Clara County, including its school districts, have paid claims and have sustained damages in excess of $2,560,000 paid pursuant to County Defendants' participation in education programs funded with public money from the State of California and Santa Clara County.

205. County Defendants and Defendant ESUHSD are liable under the False Claims Act for three times an amount in excess of $2,560,000 plus up to $10,000 civil penalty for each false claim presented or caused to be presented to be paid out of state and county funds, a portion of which will be awarded to the qui tam plaintiff. The County Defendants and Defendant ESUHSD are also liable for reasonable expenses necessarily incurred, plus reasonable attorneys' fees and costs of the qui tam plaintiff.

COUNT VI

(County Defendants and ESUHSD)

Conspiracy to Violate California False Claims Act, Government Code § 12650 et seq., including § 12651(a)(3) with respect to all the SCCOE Special Education Programs on the Foothill Campus

206. Paragraphs 1-168 are hereby incorporated by reference.

207. From at least June, 1998 through the present, County Defendants and Defendant ESUHSD conspired to defraud the State of California and Santa Clara County by getting false or fraudulent claims allowed or paid by knowingly (as defined in Government Code § 12650(b)(2)) making, using or causing to

be made or used, documents, including a "Certification of Participation, Compatibility, and Compliance Assurances" and Local Plans for the provision of Special Education, and other reports and other assurances containing false or fraudulent statements regarding eligibility to receive state and county public funds for education, including false statements regarding compliance with all applicable requirements of state and federal laws and regulations.

208. These false or fraudulent statements were made to get funds paid or approved by the State of California and Santa Clara County for Defendants' participation in programs for the support of education, particularly for the support of the education of students with special needs.

209. Contrary to their assurances, the County Defendants and ESUHSD conspired to prevent the SCCOE special education programs on ESUHSD's Foothill alternative school campus from complying with the applicable laws and regulations, which include:

a. providing a free appropriate public education in the least restrictive environment

b. with opportunities for these students to socialize with, and derive the same benefits as regular education students, including

   i. graduation ceremonies,

   ii. earned high school diplomas, and

   iii. access to special facilities and extracurricular activities.

210. Based on the foregoing acts, the State of California and Santa Clara County, have paid claims and sustained damages in excess of $2,560,000 paid pursuant to the participation of the County Defendants' [sic] and ESUHSD in education programs funded with money from the State of California and Santa Clara County.

211. County Defendants and Defendant ESUHSD are liable under the False Claims Act for three times the amount of at least $2,560,000 plus up to $10,000 civil penalty for each false claim presented or caused to be presented to the State of California and Santa Clara County, a portion of which will be awarded to the qui tam plaintiff. The County Defendants are also liable for reasonable expenses necessarily incurred, plus reasonable attorneys' fees and costs of the qui tam plaintiff.

COUNT VII

(County Defendants)

Violation of Rights of the Qui Tam Plaintiff under the California False Claims Act, Government Code § 12653 (d)

212. Paragraphs 1-211 are hereby incorporated by reference.

213. From January 2002 to June 30, 2003, the qui tam plaintiff participated in the fraud of the County [D]efendants purporting to give a free appropriate public education to the students he was teaching. This participation was caused by the County Defendants harassing the qui tam plaintiff by having him work toward the wrong credential and refusing the qui tam plaintiff and his class the support and bene-

fits to which they were entitled under valid contracts and the laws and regulations of the State of California and the United States Government.

214. This fraudulent conduct of purporting to teach under circumstances that prevented the students from obtaining a free appropriate public education resulted in the County Defendants receiving money for providing a free appropriate public education that they did not provide.

215. Recognizing the fraud of teaching under these circumstances, the qui tam plaintiff complained. The consequence was that he was not reelected. If he had not been forced into participating in this fraudulent activity, there would have been nothing to complain about so his not being rehired is a direct consequence of his participation in the fraudulent activity.

216. If the qui tam plaintiff had refused to teach the students in the Foothill Pilot Program (High School) unless he was given the support to which he was entitled and to which the students were entitled as a free appropriate public education, the qui tam plaintiff would have been terminated from his position.

217. The qui tam plaintiff complained about this to some of the County Defendants beginning in September 2002,

a. first by a letter on or about September 9, 2002, copy to Defendant Fimiani;

b. by oral complaints to

   i. the qui tam plaintiff's mentor teacher,

ii. the therapist running the program in which the qui tam plaintiff was teaching, and

iii. the Special Education support person who met with the qui tam plaintiff in January 2003;

c. by an "Initial Written Response," dated February 23, 2003[,] with copies to Defendant Fimiani and to the SCCOE director of Human Resources. (This response was to the observation of the qui tam plaintiff by Defendant David Wong pointing out a number of areas in which the qui tam plaintiff had tried to provide a free appropriate education to his students despite Defendant David Wong's resistance.)

d. by a March 9, 2003 letter to Defendant Wilcox, with copies to Defendants Fimiani, and Wong and to the Executive Director of the CCTC[.] (This letter restated these complaints, citing some of the laws and rules that had been violated, and expressing a hope that litigation would not be necessary.)

218. The CCTC made no response to the qui tam plaintiff.

219. The County Defendants, which include the Compliance Officer, Defendant Fimiani, did not address the violations cited.

220. The qui tam plaintiff is voluntarily disclosing this information to the governments involved through the filing of this complaint and is prepared to assist in this litigation.

221. If the qui tam plaintiff had been reelected for the 2003-2004 year, he would have been at step 8 on the SCCOE teacher salary scale with special extra pay for having a doctorate. The salary for this position, including the doctorate amount and pay for the extended session which was held during the summer of 2003, is approximately $68,000. In addition, the cost of replacing the benefits package lost as a result of not being reelected exceeds over $5,000 and the loss of one year's pension accumulation over a 20-year retirement period is over $30,000 for a total of over $100,000.

222. The County Defendants are liable to the qui tam plaintiff under the California False Claims Act, Government Code 12653(c) and (d) for two times the amount of the damages sustained as a result of their actions, plus interest, litigation costs, reasonable attorney's fees and punitive damages.

COUNT VIII

(County Defendants)

Breach of Contract with and Fraudulent Misrepresentations to the Qui Tam Plaintiff

223. Paragraphs 1-222 are hereby incorporated by reference.

224. The County Defendants breached the following contracts with the qui tam plaintiff, or under which he was a third-party beneficiary.

225. The Santa Clara County Office of Education, San Jose State University Education Specialist Credential Moderate to Severe Disabilities Internship Program Intern Agreement Form was signed by the qui tam plaintiff and for SCCOE on December 12,

2001[,] and for San Jose State University on December 24, 2001. (A-5[.])

226. An Employment Contract with Santa Clara County Office of Education was signed for SCCOE on January 3 and by the qui tam plaintiff on January 7, 2002. (A-6[.])

227. An Employment Contract with Santa Clara County Office of Education was signed for SCCOE on June 10, 2002[,] and by the qui tam plaintiff on June 13, 2002. This contract was retyped to correct the job title and purportedly signed for the SCCOE on June 13, 2002, but not actually delivered to the qui tam plaintiff until later. He signed it on July 6, 2002. He started teaching under this 2002-2003 contract on July 1, 2002. (A-7[.])

228. Both of the above employment contracts were made expressly "subject to the laws of California and to the rules of the State Board of Education. . . ."

229. A letter to the California Commission on Teacher Credentialing from the Santa Clara County Office of Education signed for SCCOE on May 4, 2001[,] set forth some of the conditions the SCCOE agreed to in connection with its Moderate to Severe Internship program. (See A-4[.]) This letter was incorporated in the above employment contracts as part of compliance with the laws of California and the rules of the State Board of Education[.]

230. This letter from the SCCOE also constitutes a contract with the State of California under which the qui tam plaintiff is a third party beneficiary.

231. The qui tam plaintiff performed all his obligations to the County Defendants under these contracts.

232. By virtue of the conduct described above, including the violation of applicable statues, regulations and program provisions, the County Defendants breached these contracts.

233. In addition, by the requirement that the qui tam plaintiff enter a moderate/severe university program instead of a mild/moderate university program and by refusing to give him the supervision and support required by law, which was incorporated in the contract, the County Defendants fraudulently represented that the moderate/severe university program was the appropriate program and that the contract would be administered in accordance to all applicable law and regulations.

234. Relying on these fraudulent misrepresentations, the qui tam plaintiff took 28 credit hours of university courses in the moderate severe program and tried to give an education to his students despite the lack of proper supervision and support.

235. By reason of the foregoing, the qui tam plaintiff has suffered damages, in excess of $100,000, including, but not limited to being put in the wrong intern program, lack of the proper supervision and support in the intern program in which he was enrolled, and lack of support in teaching, which, because of his complaints, resulted in:

a. his not being reelected,

b. his not being able to obtain other employment, thereby losing salary and benefits,

c. his not being able to complete his intern program,

d. his being required to teach students who were

i. deprived of the support to which they were entitled, and

ii. who were not in the least restrictive environment, and

e. his emotional suffering.

236. The County Defendants are liable to the qui tam plaintiff for all these damages plus punitive damages and costs.

COUNT IX

(County Defendants)

For Not Continuing the Employment of the Qui Tam Plaintiff Long Enough to Give Him the Support and Supervision Required by the Public Policy to Have Well-Trained Teachers

237. Paragraphs 1-236 are hereby incorporated by reference.

238. The policy of having well-trained teachers is fundamental and substantial and is recognized in both federal and state statutory law.

239. "The Congress declares it to be the policy of the United States that a high-quality education for all individuals and a fair and equal opportunity to obtain that education are a societal good, are a moral imperative, and improve the life of every individual, because the quality of our individual lives ultimately depends on the quality of the lives of others." 20 U.S.C. § 6301(a)(1).

240. Since 1988 it has been learned that "Intensive and sustained professional development for teachers . . . focussed [sic] on teaching and learning and on helping children attain high standards, is too often not provided." 20 U.S.C. [§] 6301(c)(5).

241. National Education Goals established in Congress provided that "By the year 2000, the Nation's teaching force will have access to programs for the continued improvement of their professional skills. . . . The objectives for this goals are that . . . (iii) States and school districts will create integrated strategies to attract, recruit, prepare, retrain, and support the continued professional development of teachers . . . so that there is a highly talented work force of professional educators to teach challenging subject matter; and (iv) partnerships will be established, whenever possible, among local educational agencies, [and] institutions of higher education . . . to provide and support programs for the professional development of educators." 20 U.S.C. § 5812(4)[.]

242. This is particularly important in special education where the Congress has found that "Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—. . . (E) supporting high-quality, intensive professional development for all personnel who work with such children in order to ensure that they have the skills and knowledge necessary to enable them—(i) to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and (ii) to be prepared to lead productive, independent, adult lives, to the maximum extent possible." 20 U.S.C. § 1400(c)(5)[.]

243. The United States House Committee on Education and the Workforce has recently repeated the need for special education teachers. "A continuing shortage of special education teachers . . . hinders the educational achievement of students with disabilities under current law. Both current and prospective special education . . . education [sic] teachers should have professional development to address the educational needs of students with disabilities." House Report 108-77, p. 85 (April 29, 2003).

244. The California Commission on Teacher Credentialing (CCTC), the body that provides funds for Intern Programs, wrote, in March 2003, that it was announcing the availability of funding Intern Programs to "meet California's need for credentialed teachers." Memorandum from the CCTC Executive Director dated March 4, 2003.

245. Statutory provisions in the Education Code establish the California public policy on interns and special education teachers. The California Teacher Education Internship Act of 1967 says it was enacted with the intent "to increase the effectiveness of teachers . . . in the public school of California. . . ." Education Code § 44451[.]

246. This policy is public in the sense that having properly trained teachers inures to the benefit of the public rather than merely serving the interest of individual teachers.

247. This policy has been in existence well before the qui tam plaintiff was forced to cease his employment in this case.

248. The discharge of the qui tam plaintiff before he was given the supervision and support to which he

was entitled was a violation of this public policy to have well-trained teachers.

249. By reason of the foregoing, the qui tam plaintiff has suffered damages, in excess of $100,000.

250. The County Defendants are liable for both compensatory and punitive damages, plus costs.

COUNT X

(County Defendants)

For Not Continuing the Employment of the Qui Tam Plaintiff For the Two-year Term of the Intern Program

251. Paragraphs 1-250 are hereby incorporated by reference.

252. Because an intern cannot continue in the Intern Program if he is not employed by a local educational agency that is working with the University, the failure to continue the employment of the qui tam plaintiff terminated him from the Intern Program.

253. Although an employer can insert a contractual provision in an employment contract to permit termination without cause, "it cannot do so in violation of public policy." *Daly v. Exxon Corporation*, 55 Cal. App. 4th 39, 44 (2nd App. Dist. Div. 6)[.]

254. Not permitting the qui tam plaintiff the right to complete the two-year Intern Program was a violation of public policy.

255. By reason of the foregoing, the qui tam plaintiff has suffered damages, in excess of $100,000.

256. The County Defendants are liable for both compensatory and punitive damages, plus costs.

COUNT XI

(County Defendants)

For Not Continuing the Employment of the Qui Tam Plaintiff Without Affording Him the Protections to Which He Was Entitled as a Probationary Employee

257. Paragraphs 1-256 are hereby incorporated by reference.

258. The qui tam plaintiff was an intern employee under Education Code § 44830.3[.]

259. The qui tam plaintiff had also completed service under a contract that expired June 30, 2002, but this contract was not for a full year[.]

260. The qui tam plaintiff was a probationary employee under Education Code § 44885.5.

261. "Non-reelection" is not the same as the mere expiration of a contract. (See paragraphs 159-166 above.)

262. In any event, when an employee is either not re-elected or dismissed in violation of public policy there is no distinction between a discharge and the expiration of a contract. *Daly v. Exxon Corporation*, 55 Cal. App. 4th 39, (2nd Dist, Div.6, 1997)[.]

263. The qui tam plaintiff, as a probationary employee, was entitled to a 30 day notice with a statement of the reasons for his not being continued in the employment plus a notice of the opportunity to appeal under Education Code § 44948.3(a)(1).

264. The requirement of 30 days notice with reasons for the action being taken is a mandatory duty on the County Defendants under the Education Code that

cannot be abrogated in an employment contract. *Welch v. Oakland Unified School District*, 91 Cal. App. 4th 1421 (1st App. Dist. Div[.] 2, 2001)[.]

265. The qui tam plaintiff was never given any reasons for his not being continued as an intern nor was he given any notice of an opportunity to appeal.

266. By reason of the foregoing, the qui tam plaintiff has suffered damages, in excess of $100,000.

267. The County Defendants are liable for both compensatory and punitive damages, plus costs.

WHEREFORE, Plaintiffs demand judgment as follows:

On Count I: judgment against the County Defendants, jointly and severally, and in favor of the United States for treble its damages, such civil penalties as are allowable by law, for pre-judgment and post-judgment interest, costs and other proper relief, including reasonable expenses of the qui tam plaintiff and his attorneys' fees and costs. A portion of the proceeds awarded to the United States, to be decided by the court, will also be awarded to the qui tam plaintiff.

On Counts II and III: judgment against the County Defendants and Defendant East Side Union High School District, jointly and severally, and in favor of the United States for treble its damages, such civil penalties as are allowable by law, for pre-judgment and post-judgment interest, costs and other proper relief, including reasonable expenses of the qui tam plaintiff and his attorneys' fees and costs. A portion of the proceeds awarded to the

United States, to be decided by the court, will also be awarded to the qui tam plaintiff.

On Count IV: judgment against the County Defendants, jointly and severally, and in favor of the State of California and Santa Clara County for treble their damages, such civil penalties as are allowable by law, for pre-judgment and post-judgment interest, costs and other proper relief, including reasonable expenses of the qui tam plaintiff and his attorneys' fees and costs. A portion of the proceeds awarded to the State of California and the County of Santa Clara, to be decided by the court, will also be awarded to the qui tam plaintiff.

On Count V and VI: judgment against the County Defendants and Defendant East Side Union High School District, jointly and severally, and in favor of the State of California and Santa Clara County for treble their damages, such civil penalties as are allowable by law, for pre-judgment and post-judgment interest, costs and other proper relief, including reasonable expenses of the qui tam plaintiff and his attorneys' fees and costs. A portion of the proceeds awarded to the State of California and the County of Santa Clara, to be decided by the court, will also be awarded to the qui tam plaintiff.

On Count VII: judgment against the County Defendants, jointly and severally, and in favor of the qui tam plaintiff for the relief necessary to make him whole, including reinstatement with the same seniority status that the employee would have had if his employment had been continued, two times the amount of back pay, including benefits, interest on the back pay, compensation for any special damage

he sustained and punitive damages plus litigation costs.

On Counts VIII, IX, X, and XI: judgment against the County Defendants, jointly and severally, and in favor of the qui tam plaintiff for the relief necessary to make him whole, including reinstatement with the same seniority status that the employee would have had if his employment had been continued, back pay, including benefits, interest on the back pay, and compensation for any special damage he sustained plus punitive damages, and[]

On all Counts: costs of suit including attorneys' fees and such further or additional relief as the court deems proper.

Dated: October 14, 2003 s/

John David Stoner on behalf of the United States Government, the State of California and Santa Clara County, and pro se
Address: 1050 Borregas Ave # 14 Sunnyvale, California 94089

DEMAND FOR JURY TRIAL

The plaintiffs hereby demand trial by jury as to all claims triable by jury.

Dated: October 14, 2003 s/

John David Stoner on behalf of the United States Government, the State of

California and Santa Clara County, and pro se
Address: 1050 Borregas Ave # 14 Sunnyvale, California 94089

[NOTE: APPENDIX TABLE OF CONTENTS AND ATTACHMENTS TO COMPLAINT OMITTED]